Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1871

FRANK W. SNEPP, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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No. _____

FRANK W. SNEPP, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Frank W. Snepp, III respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The memorandum opinion and order of the district court (Appendix A, *infra*, pp. 1a-14a) is reported at 456 F. Supp. 176 (E.D. Va. 1978). The opinion of the court of appeals (Appendix B, *infra*, pp. 18a-50a) is reported at 595 F.2d 926 (4th Cir. 1979).

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the First Amendment permit the federal courts to enforce prior restraints on publication by former government employees of information acquired during their government service when the restraints are based on secrecy agreements which are not authorized by statute?

2. Does a commitment by a former government employee not to publish classified information imply a further obligation to submit unclassified information for pre-publication review by the government?

3. May a court award punitive damages against a former government employee who breaches a secrecy agreement by failing to submit for pre-publication review a manuscript not alleged to contain classified or non-public information?

STATEMENT OF THE CASE

Petitioner Frank Snepp was employed by the Central Intelligence Agency from 1968 to 1976. Upon entering the CIA, he was required to sign a "secrecy agreement" designed to prevent unauthorized disclosure of classified information. This agreement contains a broad undertaking not to publish any information relating to the CIA or intelligence activities generally.[1] When he resigned from the CIA in January 1976,

[1] The 1968 document provides in pertinent part:

> 8. Inasmuch as employment by the Government is a privilege not a right, in consideration of my employment by CIA I undertake not to publish or participate in the publication of any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of my employment by the Agency without specific prior approval by the Agency. I understand that it is established Agency policy to refuse approval to publication of or participation in publication of any such information or material.

Appendix D, *infra*, pp. 59a-60a.

Mr. Snepp signed a "termination secrecy agreement" which contains a more limited undertaking not to divulge any classified information or any information concerning intelligence or the CIA that has not been made public by the CIA, without the Agency's written consent.[2]

Mr. Snepp was stationed in Vietnam for four and a half years and was there during the final American evacuation in April 1975. After resigning from the Agency in January 1976, he published a book entitled *Decent Interval* in November 1977. The book is a highly critical account of the United States withdrawal from Vietnam at the close of the war. (Appendix B, *infra*, p. 23a). Since it contained no classified information and because petitioner feared that the CIA would attempt to suppress material which was critical of the Agency, he did not submit his book for pre-publication review.

After publication of *Decent Interval*, the United States sued Mr. Snepp, charging that he had breached purported contractual and fiduciary obligations under the 1968 secrecy agreement by not submitting the manuscript to the CIA for pre-publication review. The government explicitly stated that it does not contend that *Decent Interval* contains any classified information or any information concerning the CIA which has not been made public by the Agency. (Appendix B, *infra*, p. 24a). Nevertheless, the government as-

[2] The 1976 document provides in pertinent part:

> 3. I will never divulge, publish, or reveal by writing, word, conduct, or otherwise any classified information, or any information concerning intelligence or CIA that has not been made public by CIA, to any unauthorized person including, but not limited to, any future governmental or private employer or official without the express written consent of the Director of Central Intelligence or his representative.

Appendix E, *infra*, p. 61a.

serted that publication of the book without pre-publication review damaged the United States by causing intelligence sources to lose confidence in the Agency's ability to maintain control over information which those sources furnish in confidence. The government, however, did not establish a direct connection between publication of *Decent Interval* and the loss of any intelligence source.

The government sought both an injunction requiring Mr. Snepp to submit all future writings concerning the CIA to the Agency for pre-publication review and damages for his alleged breach of contract. The government also sought to recover petitioner's entire share of the proceeds from *Decent Interval* on the theory that he had breached a fiduciary duty.

Mr. Snepp asserted that the 1968 secrecy agreement on which the government relied could not be enforced because it imposes a system of prior restraint which violates the First Amendment to the Constitution. Petitioner also argued that even if such an agreement could be enforced with respect to classified information, as the United States Court of Appeals for the Fourth Circuit had previously held in *United States v. Marchetti,* 466 F.2d 1309 (4th Cir.), *cert. denied,* 409 U.S. 1063 (1972), and *Alfred A. Knopf, Inc. v. Colby,* 509 F.2d 1362 (4th Cir.), *cert. denied,* 421 U.S. 992 (1975), it could not be enforced with respect to unclassified information. Moreover, petitioner asserted that the 1976 agreement by its terms only applies to classified information.

After rejecting petitioner's demand for a jury trial, the district court held a two-day bench trial. The court found that Mr. Snepp "willfully, deliberately and surreptitiously" breached the secrecy agreement "for personal financial gain" (Appendix A, *infra,* p. 6a), and that petitioner's constitutional defenses were unavailing. (Appendix A, *infra,* pp. 8a-9a). The court also found that compensatory damages could not be quantified. (Appendix A, *infra,* p. 11a). Since the government had not claimed punitive damages, the court did not address that issue. However, the district court imposed a constructive trust as requested by the government and required that Mr. Snepp pay over to the United States all of his past and future profits from *Decent Interval.* (Appendix A, *infra,* p. 13a).

The court also entered a sweeping permanent injunction requiring Mr. Snepp "to submit any manuscript or other writing containing information which relates to the Central Intelligence Agency, its activities, intelligence activities generally or intelligence sources and methods, which information [he] gained during the course of or as a result of his employment with the Central Intelligence Agency, for Agency review prior to publication." (Appendix A, *infra,* pp. 16a-17a). Under the terms of this injunction, the CIA must complete its review within thirty days and may only withhold approval for information which it determines to be classified. If Mr. Snepp contests any deletion made by the CIA, the burden is on him to seek judicial review.

The injunction has imposed a severe prior restraint on petitioner since it was entered. In September 1978, while his appeal was pending, Mr. Snepp was prepared to submit two articles to *The Atlantic Monthly* and *Esquire,* which had expressed interest in publishing his work. (Appendix F, *infra,* pp. 64a-66a). One of the articles is a short fictional work concerning a romantic relationship between a CIA officer and a French woman in Saigon. The other is an essay concerning the tendency of government officials to compromise their personal beliefs in order to stay in step with official policies. Although Mr. Snepp has sworn that there is no classified information in either of these articles, he is nevertheless required by the injunction to submit them for CIA scrutiny

because they contain "information which relates to the Central Intelligence Agency, its activities, [or] intelligence activities generally. . . which information the defendant gained during the course of or as a result of his employment with the Central Intelligence Agency."[3]

On appeal, the court held that petitioner is obliged under both the 1968 and 1976 secrecy agreements to submit all writings to the CIA for pre-publication review so that the Agency may determine whether they contain any classified information. Accordingly, the court held that Mr. Snepp had breached a contract by failing to submit his manuscript, even though the manuscript is not alleged to contain any classified information. The court of appeals also affirmed the injunction on the ground that "the danger to national security arising from an unauthorized publication of classified material is so great that we think that little proof of a probable future violation is required to justify injunctive relief." (Appendix B, *infra*, p. 32a).

On the issue of damages, the court of appeals held that the government is entitled to nominal damages, since no actual damages were quantifiable. (Appendix B, *infra*, p. 35a). With one judge dissenting (Appendix B, *infra*, pp. 40a-50a), the court of appeals reversed the district court's holding that a constructive trust could be imposed in the absence of an allegation that Mr. Snepp had published any classified information. (Appendix B, *infra*, pp. 33a-35a).[4] Although the government never requested punitive damages or sought to establish its entitlement to them, the court held that punitive damages are an available remedy for breach of a secrecy agreement, if the government can prove that petitioner published *Decent Interval* "willfully, deliberately and surreptitiously" for "personal financial gain," as the district court had found. However, since there were sharp factual disputes on these issues and since the district court had denied petitioner's demand for a jury trial, the court of appeals remanded the case for a jury trial on the issue of damages.

[3] Petitioner unsuccessfully sought a stay of the injunction with respect to these two articles in both the district court and the court of appeals.

[4] However, the court did not completely foreclose this theory of recovery, for it ruled that on remand the government could seek leave to alter its position to assert that petitioner did publish classified information. (Appendix B, *infra*, p. 33a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS AN IMPORTANT ISSUE FOR REVIEW BECAUSE THE SYSTEM OF PRIOR RESTRAINT SANCTIONED BY THE COURT OF APPEALS IMPERMISSIBLY BURDENS THE FIRST AMENDMENT RIGHTS OF THOUSANDS OF GOVERNMENT EMPLOYEES AND THE PUBLIC.

The consequences of the decision below, not only for petitioner but also for thousands of other government employees and the public at large, require that the writ be granted.

1. The CIA secrecy agreements enforced by the courts below establish a classic system of prior restraint. The would-be author must seek and obtain the censor's approval before he can publish. If he bypasses the censor, he is liable to punishment solely on the ground that he has published, regardless of what he publishes. As this case demonstrates, the author cannot subsequently defend his publication on the ground that it posed no danger and is protected by the First Amendment. Judicial enforcement of a secrecy agreement by injunction additionally subjects an author to the threat of a contempt prosecution for subsequent publications, to which the unconstitutionality of the order is not a defense. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

This regime of censorship imposes an intolerable burden on the right of petitioner and other CIA employees to publish their views on matters of great public concern and on the right of the public to recieve such information. The sweep of this system is demonstrated by the fact that it even reaches the fictional short story and reflective essay which Mr. Snepp has written.

2. Secrecy agreements are not imposed by the CIA alone. The Departments of State, Defense, Energy, and Treasury, the military services, and the Nuclear Regulatory Commission all use some form of secrecy agreement. The decision of which review is sought might well encourage other departments and agencies to adopt this secrecy device to restrict the flow of information to the public.

3. Furthermore, this case presents very different issues from the previous cases in which the CIA's system of prior restraint based on secrecy agreements has been considered. *United States v. Marchetti, supra,* and *Alfred A. Knopf, Inc. v. Colby, supra.* Those cases concerned a former CIA employee who had published classified information and sought to continue to do so.[5] This is the first case involving only unclassified information which had previously been made public by the CIA. Also, in contrast to the *Marchetti-Knopf* litigation, the government in this case has succeeded

[5] The *Marchetti* and *Knopf* rulings on which the courts below relied have been severely criticized by legal scholars. Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information,* 73 Colum. L. Rev. 929, 1078-79 (1973); Hill, *Defamation and Privacy Under the First Amendment,* 76 Colum. L. Rev. 1205, 1294-95 (1976); Ryan, *United States v. Marchetti and Alfred A. Knopf, Inc. v. Colby: Secrecy 2; First Amendment 0,* 3 Hastings Const. L.Q. 1073 (1976); Note, *Constitutional Law – Prior Restraint Enforced Against Publication of Classified Material by CIA Employee,* 51 N.C. L. Rev. 865 (1973).

not only in enjoining publication, but also in winning the opportunity to collect substantial punitive damages based solely on the failure to submit unclassified information for pre-publication review by the CIA.

II. THE PRIOR RESTRAINT IMPOSED ON PETITIONER IS CONTRARY TO THE DECISIONS OF THIS COURT.

The decision below is in sharp conflict with the decisions of this Court concerning prior restraint in at least five respects.

1. This Court has repeatedly held that any system of prior restraint bears a heavy presumption against its constitutional validity, *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963), and that the government carries a heavy burden in justifying the imposition of any restraint, *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971). *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976); *Near v. Minnesota,* 283 U.S. 697 (1931). Indeed, this Court has never sustained prior restraint of political speech, even when the government has contended that publication will cause grave danger to the natio al security. *New York Times Co. v. United States,* 403 U.S. 713 (1971). Mr. Justice Stewart, writing for himself and Mr. Justice White in that case, stated that prior restraints are prohibited in the absence of proof that disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730. *See id.* at 725-26 (Brennan, J., concurring); *Nebraska Press Ass'n v. Stuart, supra,* 427 U.S. at 559. In this case, the government has alleged only speculative injury from the publication of unclassified information, and such speculation cannot overcome the heavy presumption against prior restraint.

2. Judicial enforcement of the CIA's agency-created censorship system also conflicts with the decisions of this Court

because that system lacks explicit statutory authorization. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-86 (1952); *see also id.* at 593-628 (Frankfurter, J., concurring). Without such authorization, the courts may not enjoin publication, except perhaps in extraordinary circumstances. In *New York Times Co. v. United States, supra*, 403 U.S. 713, five of the six concurring Justices – Justices Black, Douglas, Stewart, White and Marshall – based their decision in varying degrees on (1) the absence of any congressional authorization for the prior restraint which the government sought; and (2) the fact that Congress has enacted criminal statutes which penalize disclosure, thereby preempting unilateral executive action in this field.

3. The lack of any statutory authorization for the CIA's system of prior restraint conflicts with the decisions of this Court in another respect as well. This Court has held that an executive branch agency cannot impose such a severe burden on the fundamental constitutional rights of government employees in the absence of explicit authorization from either the Congress or the President. In *Greene v. McElroy*, 360 U.S. 474 (1959), the Court ruled that the Department of Defense could not in the absence of explicit authorization dismiss employees for security reasons without providing an opportunity to confront and refute the evidence against them. 360 U.S. at 507. Petitioner's First Amendment right to publish without prior restraint is at least as fundamental as the right to procedural due process which was at stake in *Greene*, and that right cannot be abridged through a system of censorship which has been devised by the Director of Central Intelligence without any higher authorization. *See Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Kent v. Dulles*, 357 U.S. 116 (1958).[6]

[6] The court of appeals' conclusion that the National Security Act of 1947 authorizes the CIA's system of prior restraint is clearly in error. That statute charges the Director of Central Intelligence with responsibility for "protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403(d)(3). The statute does not contain an "express and appropriately limited congressional authorization for prior restraints." *New York Times Co. v. United States, supra*, 403 U.S. at 731 (White, J., concurring). *See Greene v. McElroy, supra*, 360 U.S. at 502-04. Indeed, the CIA itself has recognized that it lacks statutory authority to enforce its system of prior restraint. In 1974, when William E. Colby, then Director of Central Intelligence, sought legislation to authorize injunctions against disclosure, he acknowledged that "there is no existing statutory authority for injunctive relief." (Appendix G, *infra*, p. 68a). However, despite the fact that such legislation was proposed as recently as 1976 by President Ford, H.R. 12162, 94th Cong., 2d Sess. (1976), Congress has not acted.

4. The decision below depends on the theory that petitioner waived his First Amendment rights by signing the 1968 secrecy agreement and accepting employment with the CIA.[7] This conclusion too is in conflict with the decisions of this Court. In *Cole v. Richardson*, 405 U.S. 676, 680 (1972), the Court stated that government employment may not "be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities such as . . . criticizing institutions of government. . . ." *See Elrod v. Burns*, 427 U.S. 347, 358 n.11, 359-60 n.13 (1976); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967).

5. The constitutional infirmities of the CIA's system of prior review are exacerbated in this case because the agency claims the right to review unclassified materials, even though petitioner has no contractual obligation to submit unclassified writings. To the extent that Mr. Snepp is contractually

[7] This waiver concept was developed in *United States v. Marchetti, supra*, 466 F.2d at 1316, and *Alfred A. Knopf, Inc. v. Colby, supra*, 509 F.2d at 1370.

bound to submit to pre-publication review, the duty is limited to the provisions of the 1976 agreement (Appendix E, *infra*), which require only that CIA employees obtain prior authorization to publish information which is classified or which has not been made public by the CIA. *See* note 2, *supra.*[8] The government does not contend that Mr. Snepp has published any such information, but the court of appeals nonetheless concluded that there was a contractual breach because the second agreement implies an obligation to submit all information so that classified information will not be published. This disregard for the plain language of the 1976 agreement ignored the principle that where government regulation affects First Amendment activity, "[p]recision of regulation must be the touchstone," *NAACP v. Button,* 371 U.S. 415, 438 (1963), and any licensing authority must be guided by "narrow, objective and definite standards." *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 151 (1969). *See Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

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[8] The 1976 agreement is controlling because when the provisions of two contracts entered into by the same parties and covering the same subject matter are inconsistent with each other, "it is a well settled principle of law that the later contract supersedes the former contract as to inconsistent provisions." *NLRB v. International Union of Operating Engineers,* 323 F.2d 545, 548 (9th Cir. 1963). *Restatement of Contracts,* § 408 (1932); 6 *Corbin on Contracts,* § 1296 (1962). There was consideration to support the formation of the 1976 agreement because both the CIA and Mr. Snepp received something of value when he signed the 1976 document. Paragraphs 5, 7, and 8 contain at least three fresh promises to the CIA from Mr. Snepp. In exchange for these new commitments on his part, Mr. Snepp received a release from the requirements of paragraph 8 of the 1968 agreement that he submit unclassified material for pre-publication review and that he not publish such information without CIA approval.

III. THE COURT OF APPEALS' APPROVAL OF PUNITIVE DAMAGES CONFLICTS WITH DECISIONS OF THIS COURT.

The holding of the court of appeals that the government has the opportunity to recover punitive damages conflicts with the decisions of this Court which place strict limitations on the assessment of damages against those who publish information of public importance.

1. This case closely resembles the abuses which *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and related cases have sought to eliminate – the use of damages to punish unpopular or controversial ideas or conduct. In *New York Times,* the Court was "adjudicating in an area which lay close to seditious libel," where "history dicated extreme caution in imposing liability" due to the possibility that a recovery would be "viewed as a vindication of governmental policy" which had been criticized. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 153-54 (1967) (plurality opinion of Harlan, J.). *See New York Times Co. v. Sullivan, supra,* 376 U.S. at 269-83. Where, as here, no classified information is alleged to have been published, a jury might assess substantial punitive damages because it disagrees with *Decent Interval* or disapproves of petitioner for writing it.

2. At worst, petitioner can be found to have refused to clear with the CIA a book which is not alleged to contain any classified information. Even as to false defamations, this Court has recognized that in the First Amendment area any recovery beyond "compensation for actual injury" must be carefully limited because of the threat to speech protected by the First Amendment. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 349 (1974). *See Carey v. Piphus,* 435 U.S. 247, 254-55 (1978). In *Gertz,* this Court strictly limited punitive damages awards in libel cases because "juries assess punitive

damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused," creating the risk that they will "use their discretion selectively to punish expressions of unpopular views." 418 U.S. at 350.

In *Electrical Workers v. Foust*, 47 U.S.L.W. 4600 (May 29, 1979), this Court held that punitive damages may never be awarded against a union in a fair representation case because of the general labor policy against punishment and the potentially disruptive consequences of such awards. As an improper use of the extraordinary sanction of punitive damages, this case is more compelling than *Foust* in several respects. The policy which would be adversely affected by the possibility of harsh punitive awards is not merely a labor relations policy legislated by Congress, but rather the core protection afforded by the First Amendment. If false defamation and union misconduct are insulated from punitive awards, surely a book about the United States evacuation from Vietnam deserves at least as much protection.[9]

3. The court of appeals also indicated that in its view it is proper to subject petitioner to the risk of a substantial punitive damage judgment in part because he received compensation for writing *Decent Interval*. *See* Appendix B, *infra*, p. 39a. Under the prior decisions of this Court, however,

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[9] The decision below is also a departure from the rule that punitive damages are ordinarily not recoverable for breach of contract. *Restatement of Contracts*, § 342 (1932); 11 *Williston on Contracts*, § 1340 (3d ed., 1968); 5 *Corbin on Contracts*, § 1077 (1962); D. Dobbs, *Law of Remedies*, § 12.4 at 818 (1973); *McCormick on Damages* 289-90 (1935); *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412, 414 (2d Cir. 1978) ("It is well understood that punitive damages are not recoverable in an action for breach of contract."). Indeed the court of appeals recognized that it was creating a new exception to this rule. (Appendix B, *infra*, p. 36a).

the First Amendment rights of petitioner and the public are not reduced simply because the book was published as a commercial undertaking. *Time, Inc. v. Hill*, 385 U.S. 374, 396-97 (1967); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778-83 (1978).

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit,

Respectfully submitted,

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June 18, 1979

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	
FRANK W. SNEPP, III,	:	78-92-A
Defendant.	:	

MEMORANDUM OPINION AND ORDER

In this case the United States does not seek to enjoin the publication of a book[1] but rather to redress through more commonly utilized remedies the defendant's breach of his contractual and fiduciary duties caused by his failure to submit to the CIA for its initial review all manuscripts which contain information gained by him as a result of his CIA employment.

The defendant admits he did not submit the said manuscripts to the Agency for pre-publication review – he says he was not under any legal obligations to so do because the secrecy agreement in question violates the First and Fifth Amendments to the United States Constitution.

He claims the United States lacks standing to bring this suit because it does not allege any harm to the national security or other cognizable interest of the United States.

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[1] The book "Decent Interval" was published prior to the filing of this suit.

He further claims the termination secrecy agreement he signed when he resigned from the CIA relieved him of his obligation to submit the said manuscripts for pre-publication review – and that even if the September 16, 1968 secrecy agreement were enforceable, CIA breached the agreement by failing to provide him an opportunity for a hearing on the evacuation of Vietnam.

He also claims the CIA is estopped from enforcing the secrecy agreement against him because it has permitted other employees to make unauthorized disclosures of information concerning the Agency, including information concerning intelligence sources and methods.

He claims the CIA fraudulently induced him to accept employment with the Agency and to sign the secrecy agreement.

He also claims duress – lack of consideration – mutuality of obligations – perpetuity – and that it is an unreasonable contract of adhesion and an unconscionable agreement.

He says he did not and does not owe any fiduciary duty to the CIA and that the Government has failed to mitigate its purported damages.

He prays that the suit be dismissed with prejudice and in the event the action goes to trial, he demands a trial by jury.

The Government's motion for an immediate judgment on the pleadings was denied pending completion of the record by both parties via discovery.

After completion of extensive discovery, the defendant filed a motion for summary judgment – that motion was heard and denied and the case was set for a formal pre-

trial hearing to identify what factual issues, if any, remained to be heard by the Court and/or the jury on June 20.

Based on the record thus made, the Court concluded that all the material facts were undisputed – whereupon, the jury panel was excused and the matter was heard and determined by the Court on the stipulations and the live and documentary evidence tendered by the parties in support of their respective positions.

The parties stipulated:

1. The Central Intelligence Agency, an agency of the United States, was established by the National Security Act of 1947. Under the provisions of the Act and implementing provisions of Executive Order 12036 and predecessor Executive Orders, the Agency is authorized to collect intelligence information relating to National Security and to correlate, evaluate, and disseminate within the United States Government, intelligence relating to National Security.

2. The position of the Director of Central Intelligence was established by the National Security Act of 1947. The Director serves as head of the Agency. Section 102(d)(3) of the Act, Title 50, United States Code, §403(d)(3), charges the Director with responsiblity for "protecting intelligence sources and methods from unauthorized disclosure."

3. On September 16, 1968, prior to the commencement of his official duties as an employee of the Central Intelligence Agency, defendant Frank W. Snepp III signed a secrecy agreement with the Agency. A true and correct copy of that agreement is attached to the complaint as Exhibit A.

4. Defendant Frank W. Snepp III was employed by the Central Intelligence Agency from September 16, 1968, until he resigned, effective January 23, 1976. During the per-

iod of his Agency employment, defendant Snepp served two tours of duty in South Vietnam. The dates on his tours of duty were from June 2, 1969 to June 21, 1971 and from October 4, 1972 to April 29, 1975.

5. During the course of his employment by the Central Intelligence Agency, defendant Frank W. Snepp III was assigned to various positions of trust, including two tours of duty in South Vietnam during the periods June 2, 1969 to June 21, 1971 and from October 4, 1972 to April 29, 1975, and was granted frequent access to classified information, including information regarding intelligence sources and methods.

6. Defendant Frank W. Snepp III submitted to Random House, Inc., for publication a non-fiction book entitled "Decent Interval". The book concerns the activities of the Central Intelligence Agency in South Vietnam and elsewhere, and it is based in large part on information obtained by defendant Snepp in the course of his Agency employment, including his tours of duty in South Vietnam during the periods June 2, 1969 to June 21, 1971 and from October 4, 1972 to April 29, 1975.

7. In November, 1977, Random House, Inc. published and placed in the stream of commerce for ultimate retail sale the non-fiction book by the defendant Frank W. Snepp III, entitled "Decent Interval".

Snepp admits in his answer and in his deposition that he did not submit his manuscripts relating to his book, "Decent Interval", to the CIA for pre-publication review.

The Court finds from the evidence thus received that Frank W. Snepp III was fully briefed and advised before entering on duty with the CIA that he was undertaking a position of trust in that Agency of the Government respon-

sible to the President and the National Security Counsel for intelligence relating to the security of the United States of America;

That he understood that in the course of his employment he would acquire information about the CIA and its activities and about intelligence acquired or provided by the Agency;

That he knew that employment by the Government was a privilege – not a right;

That he had to sign a secrecy agreement upon entering on duty with the CIA;

That he read and fully understood the duties and responsibilities set forth in the said secrecy agreement; and

That he signed the said secrecy agreement on September 16, 1968 without any mental reservations or purpose of evasion.

Mr. Snepp knew – he was told by Admiral Turner, Associate Counsel and other CIA officials that he could not release his manuscripts on the evacuation of Vietnam for publication without prior Agency approval.

He knew this Court had enjoined Victor L. Marchetti, a former employee of the CIA, from publishing his proposed book in violation of his secrecy agreement.

Although he assured, or at least lead both Admiral Turner and Mr. Morrison of the CIA legal staff to believe that he would submit his manuscripts for Agency review before publication – the Court finds he had no intention of so doing because was then making secret arrangements with Random House, Inc. to publish the book – all negotiations were conducted on park benches, in restaurants and/or in

the public library. Snepp admits he did everything he could to keep the CIA from knowing about it prior to publication.

The Court finds from this evidence that Frank W. Snepp III willfully, deliberately and surreptitiously breached his position of trust with the CIA and the secrecy agreement dated September 16, 1968 by causing Random House, Inc. to publish "Decent Interval" (an insider's [his]account of Saigon's indecent end) without specific prior approval by the Central Intelligence Agency.

The Court further finds Mr. Snepp published the book "Decent Interval" for personal financial gain – he admits he has already received some sixty thousand dollars in advance payments and the contract with Random House, Inc. calls for royalties and other potential profits.

The undisputed evidence discloses that the CIA collects intelligence by two generic ways – one is through human sources who tell us information – we call that "sources" – the other is through technical means of collecting data, where a machine does it for you in one way or another – we call those "methods" of collecting intelligence.

Most of CIA's sources and methods are classified – if you disclose sources you are subjecting them to possible death, possible loss of position, possible loss of job – if you disclose your methods, you are making available to others the development of counter-methods to your methods, that would in effect make them useless.

The National Security Act of 1947 – amended 1969 – requires the Director of the CIA to prohibit intelligence sources and methods from unauthorized disclosure.

Both Admiral Turner and Mr. Colby testified, "In order to maintain your secrets you must have some form of control over unauthorized release."

When Admiral Turner was asked if there had been any adverse effect resulting from Snepp's refusal to submit his book for pre-publication review, he replied:

> There clearly has. Over the last six to nine months, we have had a number of sources discontinue work with us. We have had more sources tell us that they are very nervous about continuing work with us. We have had very strong complaints from a number of foreign intelligence services with whom we conduct liaison, who have questioned whether they should continue exchanging information with us, for fear it will not remain secret. I cannot estimate to you how many potential sources or liaison arrangements have never germinated because people were unwilling to enter into business with us. . . .

Admiral Turner did not attribute all of this to Mr. Snepp – he said:

> [H]is is one, and a very serious one, of a number of incidents that have diminished this world-wide confidence in our ability.
>
> His, in particular, because it has flaunted the basic system of control that we have. If he is able to get away with this, it will appear to all those other people that we have no control, we have no way of enforcing the guarantee which we attempt to give them when we go to work with them.

Mr. Colby, a former Director of the CIA, was called by the defendant – he said substantially the same thing.

The Court finds that the publication of Snepp's book, "Decent Interval", absent CIA pre-publication review has

caused the United States irreparable harm and loss. It has impaired CIA's ability to gather and protect intelligence relating to the security of the United States of America.

Snepp's attempts to justify his failure to submit his book to the CIA for pre-publication review on numerous grounds – all of which lack sufficient evidentiary and/or legal support.

He misreads *Marchetti*[2] – as supporting his First and Fifth Amendment claims – that case does not invalidate CIA's secrecy agreement.

Chief Judge Haynsworth, speaking for the Fourth Circuit Court of Appeals, held:

> [T]hat the secrecy agreement executed by Marchetti at the commencement of his employment was not in derogation of Marchetti's constitutional rights. Its provision for submission of material to the CIA for approval prior to publication is enforceable, provided the CIA acts promptly upon such submissions and withholds approval of publication only of information which is classified and which has not been placed in the public domain by prior disclosure.

Snepp's 1968 secrecy agreement and Marchetti's secrecy agreement are sufficiently similar to warrant the same holding.

Snepp's secrecy agreements are clear and unambiguous. His 1976 secrecy termination agreement is not limited to classified information, as he would have you read it – it reads classified information or any information concerning intelligence of CIA that has not been made public by CIA.

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[2] United States v. Marchetti, 466 F.2d 1309 (1972).

Both secrecy agreements require submission of all such material for CIA pre-publication review.

Snepp's termination briefing indicates he was so told.

Further, Snepp is not the judge of what portions, if any, of CIA's intelligence may be made public.

On the question of whether the CIA breached ¶6 of the 1968 secrecy agreement – the defendant says no one in the CIA would give him a hearing on his complaint in re the evacuation of Vietnam. The Government concedes the defendant was not given the requested hearing. He admits, however, he did not present his grievance or complaint to the Inspector-General as provided for in the said paragraph.

¶6 of the 1968 secrecy agreement is clear and unambiguous. That paragraph pertains to the carrying of grievances or complaints outside the Agency – had the CIA breached ¶6 – (and the Court did not so find) – that would not release the defendant from fully complying with ¶8 of the secrecy agreement.

Snepp was given every opportunity to prove his claims of fraud and duress – he withdrew his claim of duress before trial and said his only evidence of fraud was that a briefing officer had told him he could use his discretion in determining what should or should not be released to the public – he claims he would not have signed the secrecy agreement otherwise. He could neither name nor identify the briefing officer prior to the trial even though he had seen and talked to all three of them. He did name one, however, when the three were required to stand in the courtroom. The one named had no recollection of ever seeing or talking to Snepp in 1968.

Fraud, in the procurement of a contract, requires far more convincing evidence.

The secrecy agreement of 1968 is clear and unambiguous – oral testimony is inadmissible to vary the unambiguous terms of a written agreement. *See* Rock-Ola Manufacturing Corp. v. Wertz, 282 F.2d 208 (4th Cir. 1960).

Further, a CIA briefing officer has no authority to change or alter the terms of the CIA secrecy agreement.

Snepp's claim that the United States lacks standing to bring this suit – lacks merit.

> Jurisdiction arises from the presence of the United States as a party. 28 U.S.C. §1345. "The government can sue even if there is no specific authorization. In such cases, however, it must have some interest to be vindicated sufficient to give it standing." C.A. Wright, Federal Courts 68 (2d ed. 1970), ch. 3 § 22. Standing arises from the government's interest in protecting the national security.[3]

United States v. Marchetti, *supra,* at 1313. *See also, id.* n. 3.

The defendant's other defenses have been fully heard and denied for the reasons then stated – there is no need to repeat them again.

We now turn to the question of damages.

Counsel for Snepp says there is insufficient evidence in this case to support any award beyond nominal damages – we disagree – nominal damages in a case like this would be nothing more than a license to continue doing that which the law forbids.

This action involves a substantial wrong to the United States and to the public's interest in the effective functioning of its Government.

Snepp's willful refusal to comply with his pre-publication review obligations to the CIA demonstrates, unless redressed, the potential vulnerability of all information provided to the CIA on a confidential basis. It is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this nation in an atmosphere of mutual trust unless they can be assured that their confidence will be kept.

Although such injury is not quantifiable with any reasonable degree of certainty, nominal damages are grossly inadequate as redress for Mr. Snepp's willful breach of trust.

As was said by Chief Judge Haynsworth in *Marchetti, supra:*

> Gathering intelligence information and the other activities of the Agency, including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed Forces. Const., art. II, § 2. Citizens have the right to criticize the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest.
>
> * * *

Although the First Amendment protects criticism of the government, nothing in the Constitution requires the government to divulge information:

* * *

Congress has imposed on the Director of Central Intelligence the responsibility for protecting intelligence sources and methods. 50 U.S.C. § 403(d) (3). In attempting to comply with this duty, the Agency requires its employees as a condition of employment to sign a secrecy agreement, and such agreements are entirely appropriate to a program in implementation of the congressional direction of secrecy. Marchetti, of course, could have refused to sign, but then he would not have been employed, and he would not have been given access to the classified information he may now want to broadcast.

Confidentiality inheres in the situation and the relationship of the parties. Since information highly sensitive to the conduct of foreign affairs and the national defense was involved, the law would probably imply a secrecy agreement had there been no formally expressed agreement, but it certainly lends a high degree of reasonableness to the contract in its protection of classified information from unauthorized disclosure.

Moreover, the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment. One may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure of such information, but the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that

greater and more positive assurance is warranted. Some prior restraints in some circumstances are approvable of course. See Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L.Ed. 2d 649.

Although Snepp retains the right to speak and write about the CIA, and to criticize it as any other citizen may – he may not publish any information or material relating to the CIA, its activities or intelligence activities generally, obtained during the course of his employment, either during or after the term of his employment, without specific prior approval by the Agency.

The CIA cannot protect its intelligence sources and methods if its agents are allowed to determine what intelligence ought to be made public.

One who breaches his trust and secrecy agreements with the agency of the United States charged with the responsibility for protecting intelligence sources and methods ought not to be permitted to retain his ill-gotten gains.

Anything less will not suffice to prevent unauthorized disclosure of such information.

Courts of equity frequently go much further to give relief in furtherance of the public interest than they are accustomed to go when only private interests are at stake.

Therefore the Court will exercise its equity powers and impose a constructive trust over and require an accounting of any and all revenue, gains, profits, royalties and other advantages derived by the defendant from the sale, serialization, republication rights in any form, movie rights or other distribution for profit of the work entitled "Decent Interval".

In addition, the defendant will be enjoined from any further violation of his secrecy agreement by requiring him to submit to the Central Intelligence Agency for pre-publication review any manuscript which the defendant authors which concerns the Central Intelligence Agency, its activities or intelligence activities generally which the defendant gained during the course of or as a result of his employment with the Agency.

And It Is So Ordered.

Counsel for the Government should forthwith prepare an appropriate judgment and injunction in accordance with this Memorandum Opinion and Order, submit the same to counsel for the defendant for approval as to form, and then to the Court for entry.

The Clerk will send a copy of this Memorandum Opinion and Order to all counsel of record.

July 7, 1978

/s/ Oren R. Lewis
United States Senior District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	NO. 78-92-A
FRANK W. SNEPP III,	:	
Defendant.	:	

ORDER

In accordance with the Memorandum Opinion and Order entered by this Court on July 7, 1978, it is hereby ORDERED, ADJUDGED and DECREED:

(1) that a constructive trust for the benefit of the United States is hereby imposed over any and all revenues, gains, profits, royalties and other financial advantages derived by the defendant, Frank W. Snepp III, from the sale, serialization, republication rights in any form, movie rights and other distribution for profit of the work entitled *Decent Interval* in the possession or control of the defendant, his assigns, agents servants, employees, and attorneys, and those persons in active concert or participation with him who receive actual notice of this Order through personal service or otherwise,

(2) that the defendant, Frank W. Snepp III, file with this Court on or before August 28, 1978 an accounting of any and all revenues, gains, profits, royalties and other

financial advantages derived by the defendant from the sale, serialization, republication rights in any form, movie rights or other distribution for profit of the work entitled *Decent Interval* which have heretofore been paid to the defendant, his assigns, agents, servants, employees and attorneys, and those persons in active concert or participation with him who receive actual notice of this Order through personal service or otherwise, together with his check payable to the Treasurer of the United States, for the monies thus accounted for.

(3) that the said Frank W. Snepp III is further directed to forthwith pay to the Treasurer of the United States any and all revenues, gains, profits, royalties and other financial advantages derived by him after his first accounting from the sale, serialization, republication rights in any form, movie rights or other distribution for profit of the work entitled *Decent Interval,* said monies to be paid by check or money order payable to the Treasurer of the United States and forwarded to the United States Department of Justice, and

(4) it is further ORDERED, ADJUDGED and DECREED that the defendant, Frank W. Snepp III, his assigns, agents, servants, employees and attorneys, and those persons in active concert or participation with him who receive actual notice of this Order through personal service or otherwise, and each of them, be and they hereby are permanently enjoined from further breaching the terms and conditions of the defendant's Secrecy Agreement and fiduciary duty with the Central Intelligence Agency by failing to submit any manuscript or other writing containing information which relates to the Central Intelligence Agency, its activities, intelligence activities generally or intelligence sources and methods, which information the defendant gained during

the course of or as a result of his employment with the Central Intelligence Agency, for Agency review prior to publication; *Provided,* however, that Agency review shall be made within thirty (30) days after receipt of such writing, and *Provided,* further, that the only material for which approval for publication may be withheld by the Agency is that material which the Agency determines to be classified.

The United States Marshal is hereby directed to serve a copy of this Order on the defendant, Frank W. Snepp III, and such other persons and/or corporations as the Department of Justice deems appropriate and so directs.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/ Oren R. Lewis

August 2, 1978 — United States Senior District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1651

United States of America, Appellee,

v.

Frank W. Snepp, III, Appellant.

The Authors League of America, Inc., Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, Senior District Judge.

Argued November 15, 1978 Decided March 20, 1979

Before WINTER and PHILLIPS, Circuit Judges, and HOFFMAN,* Senior District Judge.

Mark H. Lynch (John H.F. Shattuck, American Civil Liberties Union Foundation; Stephen Bricker, American Civil Liberties Union of Virginia; John Cary Sims; Alan Dershowitz; Geoffrey J. Vitt on brief) for Appellant; Robert E. Kopp, Appellate Litigation Counsel, Department of Justice (Anthony A. Lapham, General Counsel, Ernest Mayerfeld, Associate General Counsel, Christian F. Winkle, IV, Attorney, Central Intelligence Agency; Barbara Allen Babcock, Assistant Attorney General, William B. Cummings, United States Attorney,

Thomas S. Martin, Deputy Assistant Attorney General, David J. Anderson, Director, Elizabeth Gere Whitaker, Assistant Director, Thomas G. Wilson and Brook Hedge, Attorneys, Civil Division, Department of Justice on brief) for Appellee; (Irwin Karp on brief) for Amicus Curiae The Authors League of America, Inc.; (Jack C. Landau, Gordon F. Barrington, Jeffrey Tobias, Law Student Researcher, National Law Center, George Washington University, and Jack Gillman, Law Student Researcher, Stanford University Law School on brief) for Amicus Curiae The Reporters Committee for Freedom of the Press; (Henry R. Kaufman, Ira M. Millstein, R. Bruce Rich, Weil, Gotshal & Manges on brief) for Amici Curiae Association of American Publishers, Inc.

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* Walter E. Hoffman, Senior District Judge, United States District Court for the Eastern District of Virginia, sitting by designation.

WINTER, Circuit Judge:

The United States sued a former employee of the Central Intelligence Agency (CIA) alleging that defendant breached a secrecy agreement with the CIA by publishing a book about the activities of the CIA in South Vietnam and elsewhere without the prior permission and approval of the CIA. The CIA does not assert, however, that the book disclosed classified information or information that defendant had no right to publish. Although defendant prayed a jury trial, the district court heard the case without a jury and granted judgment for plaintiff, ruling that there were no factual issues to be tried by a jury, that the defendant was in breach of his agreement, that he should be enjoined from further publications except in strict compliance with his undertaking to submit proposed

publications to the CIA for its prior approval, and that, for breach of his fiduciary obligation not to publish without CIA approval, a constructive trust for the benefit of the government should be imposed on all of the monies which defendant had earned and will earn from publication of his book. Defendant appeals, asserting numerous errors in the trial proceedings and the district court's judgment.

We conclude that defendant was under a valid contractual obligation to submit proposed publications to the CIA for its prior approval, that he breached this agreement, and that the entry of an injunction against further breaches was fully justified and not an abuse of discretion. But we think that it was not shown on this record that defendant breached a fiduciary obligation, and it was therefore improper for the district court to impose a constructive trust on the monies earned from publication of the book. We think that the government is entitled at least to nominal damages for breach of contract and it may be entitled to compensatory and punitive damages also. But if compensatory and punitive damages are sought to be recovered, the issues relating thereto must be submitted to a jury. We therefore affirm in part and reverse in part, remanding the case for further proceedings.

I.

Defendant was first employed by the CIA on September 16, 1968. At the time that he was employed he executed a secrecy agreement, the pertinent provisions of which are set forth in the margin, in which he undertook "not to publish . . . any information or material relating to the Agency . . . either during or after the term of my employ-

ment . . . without specific prior approval by the Agency."[1] In due course, he was assigned to two tours of duty in Vietnam where he served for four and one-half years. His service in Vietnam included the time that the United States withdrew from participation in the war and the CIA and the military liquidated their operations in that locale. By reason of his employment, defendant was granted frequent access to classified information, including information regarding intelligence sources and methods.

Defendant expressed dissatisfaction with the manner in which the CIA had conducted its affairs in Vietnam and the manner in which it withdrew, and he concluded to write a book on the subject. Defendant claims that he was motivated primarily by altruism and the desire to have the world and the American public know the truth as to

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[1] Secrecy Agreement

1. I, Frank W. Snepp, III, understand that upon entering on duty with the Central Intelligence Agency I am undertaking a position of trust in that Agency of the Government responsible to the President and the National Security Council for intelligence relating to the security of the United States of America. I understand that in the course of my employment I will acquire information about the Agency and its activities and about intelligence acquired or produced by the Agency.

* * *

8. Inasmuch as employment by the Government is a privilege not a right, in consideration of my employment by CIA I undertake not to publish or participate in the publication of any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of my employment by the Agency without specific prior approval by the Agency. I understand that it is established Agency policy to refuse approval to publication of or participation in publication of any such information or material.

what happened, but the government claims that his motive was one primarily of money. In any event, before resigning from the CIA, effective January 26, 1976, defendant negotiated an arrangement with a publisher whose identity he was assiduous in concealing, and he obtained a publication advance. Thereafter, he resigned from the CIA, and in connection with that resignation he executed the so-called "Termination Secrecy Agreement," the pertinent provisions of which are set forth in the margin, in which he agreed not to "publish . . . any classified information, or any information concerning intelligence or CIA that has not been made public by CIA . . . without the express written consent of the Director of Central Intelligence or his representative."[2] Defendant was told that his responsibilities under this agreement were the same as those under the agreement that he signed when he was employed.

Although defendant did not conceal from his CIA colleagues and former CIA colleagues the fact that he was writing a book, he represented on a number of occasions that he intended to submit the manuscript to the CIA for

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2 Termination Secrecy Agreement

1. I, Frank W Snepp, III, am about to terminate my association with the Central Intelligence Agency. I realize that, by virtue of my duties with that agency, I have been the recipient of information and intelligence that concern the present and future security of the United States of America.

* * *

3. I will never divulge, publish, or reveal by writing, word, conduct, or otherwise any classified information, or any information concerning intelligence or CIA that has not been made public by CIA, to any unauthorized person including, but not limited to, any future governmental or private employer or official without the express written consent of the Director of Central Intelligence or his representative.

prior approval before submitting it to his publisher. But this he failed to do, so he claims, because the CIA failed to act favorably, in accordance with its established procedures, on his several demands that it conduct a study and prepare a report concerning the deficiencies in its withdrawal from Vietnam. Apparently the CIA gave thought to the possibility of seeking an injunction against defendant to restrain him from publication of his book prior to submission of his manuscript to the CIA for its approval and the matter was considered by the Department of Justice. There was evidence that the CIA did not press the Department of Justice to take such action because it relied upon defendant's representations that he intended to honor his contracts.

In any event, defendant's book entitled *Decent Interval* was published in November 1977. It is a highly critical account of the United States' withdrawal from Vietnam at the close of the war and it also contains allegations that the CIA's intelligence reporting from Vietnam was fabricated and distorted, that the CIA manipulated press reporting from Vietnam by providing false information to reporters, that CIA officials in Vietnam engaged in corrupt practices, and that the CIA mishandled the evacuation from Vietnam by failing to evacuate its indigenous agents and employees.

The government sued on February 15, 1978, alleging that plaintiff had breached his contractual and fiduciary obligations to the CIA by failing to submit the manuscript of his book to the CIA for prepublication review pursuant to the original secrecy agreement. It sought a declaration that defendant had breached his contractual and fiduciary duties, damages for breach of contract, an injunction against further breaches, and an accounting and the imposition of

a constructive trust over all past and future revenues from the sale of the book. Defendant, in answering, prayed a jury trial. There was extensive pretrial discovery during which the government responded to an interrogatory asserting that it did not contend that *Decent Interval* contains classified information or any information concerning intelligence or CIA that has not been made public by CIA. When the case came on for trial, the district court ruled that there were no factual issues on the merits for the jury to determine.

On the merits, the district court ruled that defendant had breached his contractual and fiduciary duty to submit his manuscript for prepublication review. Finding that the defendant's breach caused the government irreparable harm, the district court enjoined defendant from future violations and imposed a constructive trust on all revenues derived from *Decent Interval* for the benefit of the government. In so doing, it rejected, *inter alia*, defendant's defenses based upon the first amendment and his claim of illegal selective enforcement. These defenses and the facts which relate to them will be discussed more fully hereafter.

II.

We consider first defendant's contentions relating to his rights under the first amendment and to his contractual obligations. Defendant argues that the 1968 secrecy agreement is in violation of the first amendment and that, to the extent that it applies to classified data, the CIA lacked congressional or presidential authority to require its execution. Defendant also argues that he had no contractual obligation to submit his manuscript for prepublication review. This argument is based upon his assertion that the 1976 termination secrecy agreement superseded the 1968 secrecy agreement,

executed when he was first employed, that the 1976 agreement only requires permission for publication of information that is classified or that has not been made public by CIA, while the latter requires prepublication submission of "all" material, and that the CIA has not claimed that defendant published anything required to be submitted under the 1976 agreement.

We see no merit in these arguments. In asserting them, we think that defendant has failed to appreciate our decisions in United States v. Marchetti, 466 F.2d 1309 (4 Cir.), *cert. denied*, 409 U.S. 1063 (1972) (*Marchetti I*); and Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4 Cir.), *cert. denied*, 421 U.S. 992 (1975) (*Marchetti II*); as well as the language in the agreements that he executed.

In *Marchetti I* and *Marchetti II*, we sustained the validity of secrecy agreements, such as those at issue here, prohibiting CIA employees from publishing classified information, from attack under the first amendment. More importantly, we sustained the constitutional validity of a prepublication review process for all intelligence-related materials for the sole purpose of permitting the CIA to identify and to withhold permission for the disclosure of classified information. Of course we recognized the first amendment right of an employee or former employee "to speak and write about the CIA and its operations, and to criticize it as any other citizen may," 466 F.2d at 1317, but we held that he had no first amendment right to "disclose classified information obtained by him during the course of his employment which is not already in the public domain." *Id.* Consistent with the first amendment, we recognized an obligation on the part of the CIA to respond promptly to a request for authority to publish, and we held that there was a right of judicial review if permission was withheld.

In *Marchetti I* and *Marchetti II*, we also noted that the National Security Act of 1947 charges the Director of Central Intelligence with the responsibility for "protecting intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403(d)(3), and that secrecy agreements are "entirely appropriate to a program in implementation of the congressional direction of secrecy." 466 F.2d at 1316. Thus, defendant's contention that the CIA lacked congressional authority to execute such agreements is without merit.

We think it largely academic whether the 1976 agreement supersedes the 1968 agreement or not.[3] Under the 1968 agreement, defendant agreed "not to publish . . . *any* information or material relating to the Agency, its activities or intelligence activities generally . . . without specific prior approval by the Agency." (Emphasis added.) Of course, under *Marchetti I* and *Marchetti II*, this obligation was enforceable only to the extent that it required defendant to submit *all* information or material relating to the CIA, its activities and intelligence, so as to permit the CIA to determine what was classified and unpublishable as distinguished from what was unclassified and publishable, and not to publish classified information not already in the public domain.

The language of the 1976 agreement is indistinguishable in its effect. It placed on defendant the obligation not to "publish . . . any classified information, or any information concerning intelligence or CIA that has not been made public by CIA . . . without the express written consent of [CIA]." The obligation was to refrain from publishing *any* material concerning intelligence or the CIA without prior submission

[3] In *Marchetti I*, 466 F. 2d at 1317 n.6, we noted that an agreement like the 1976 agreement in the instant case lacked consideration and was for that reason unenforceable. If invalid, the 1976 agreement could not supersede the 1968 agreement.

and prior approval of *all* material, but manifestly the first amendment would not permit the CIA to withhold consent to publication except with respect to classified information not in the public domain. Thus, the meaning and effect of the two agreements are identical.

We decline defendant's invitation to reexamine the correctness of *Marchetti I* and *Marchetti II;* and in reliance on them we therefore conclude that the secrecy agreements that bound defendant did not violate his first amendment rights and that each validly required him to submit to prepublication review *all* of the material he intended to publish relating in any manner to the CIA.

III.

There can be no doubt on the record before us that defendant breached his secrecy agreements. Before we turn to the rights of the government with respect to relief, we must consider some of defendant's other defenses to the breach.

A.

Defendant contends that the district court improperly declined to consider his defense of selective enforcement. Specifically, defendant argues that he is the first CIA employee who has been sued for breach of an agreement to submit to prepublication review when, in fact, he published only materials that, although critical of the CIA, are not claimed to be classified, yet other CIA officials and officials in other branches of the government have published books and articles without prepublication review with impunity. In an answer to an interrogatory, the government admitted that two books about the CIA were published by former employees without prepublication review as required by a secrecy agreement and no action was taken to prevent the violation. Other evidence suggested that a number of articles were probably published under similar circumstances.

We see no merit in the defense of selective enforcement, and we think that the district court correctly rejected it. In the first place, defendant's contention of selective enforcement appears to be premised upon the fact that his book is critical of the CIA. To establish improper discrimination in enforcement proceedings, it would be necessary to show that uncritical books were treated differently from critical books with respect to enforcement of the obligation for prepublication review. The proofs that defendant tendered fall short of that objective since they do not identify the nature of the publications with regard to which the secrecy agreement was not enforced, and hence selective enforcement depending upon the critical or non-critical content is not established.

Aside from the factual inadequacies of defendant's claimed defense, there is a basic legal reason why the defense is unavailable. Defendant has cited, and we have found, no authority suggesting that the defense of selective enforcement, normally applied in criminal cases, should be extended to civil actions. Moreover, defendant voluntarily agreed to be bound by the contractual provision requiring prepublication review and he can have little complaint about its being enforced. United States v. Crowthers, 456 F.2d 1074 (4 Cir. 1972), on which defendant heavily relies, is inapposite because it was a criminal case – a prosecution for alleged violation of regulations prohibiting disturbances and limiting the distribution of handbills on government property.

B.

At trial, defendant also raised the defenses of material breach by the CIA, a prior inconsistent oral agreement and fraud. On appeal, he asserts that with respect to all of them it was error to deny him a jury trial on the factual issues which these defenses present. Because we decide that

the government was entitled to judgment as a matter of law on these defenses, no jury consideration was required.[4]

Defendant contends that the prepublication review provisions of the 1968 secrecy agreement are unenforceable because the government breached another material provision of that contract. Defendant argues that Paragraph 6 of the 1968 secrecy agreement, the text of which is set forth below,[5] gave him a right to a hearing on his grievance that the CIA mishandled the evacuation of its indigenous agents when it withdrew from Vietnam. He testified that he was denied a hearing, although he conceded that he discussed his views with his superiors and that the Inspector General sent for him to discuss his complaint but took no action thereon. This, he claims, was a material breach on the part of the government, rendering his obligation under the contract unenforceable.

First, we do not think that paragraph 6 of the 1968 agreement can be read to guarantee to the defendant a hearing for his grievances. The evident purpose of the paragraph is to prohibit the taking of internal grievances and complaints outside of the CIA. The CIA does not guarantee in that

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[4] With exception of the issue of damages, *see* p. ____, *infra*, we agree with district court that the case presents no issue of fact for the jury to resolve.

[5] 6. I understand that for all grievances and complaints there are established procedures within the Agency permitting appeal by any employee of the Agency [redacted] plaint outside the Agency will be considered a violation of the undertaking set forth above in paragraph 3 [obligation not to divulge classified information outside of the CIA except as authorized]. If the appeal procedures are inadequate in any situation, I am aware that the Inspector General is at all times available to any employee with a legitimate criticism, grievance, or complaint.

paragraph to provide any specific grievance procedure, and certainly there was no promise of a hearing. At most, the paragraph provides that the Inspector General will be available to consider employee complaints but not that he will make any specific response. Defendant's own testimony establishes that, at the instance of the Inspector General and not that of defendant, the Inspector General did consider his complaint. Certainly defendant can claim no breach of the paragraph because the complaint was not resolved favorably to defendant.

Second, even if the CIA could be viewed as having violated Paragraph 6, we deem it an independent clause of the overall agreement, the breach of which would not excuse defendant from his obligation to submit books for prepublication review. When defendant signed the secrecy agreement, his primary purpose and the primary consideration he received were not a promise of a grievance procedure, but rather employment by the CIA in a position involving access to national security secrets. "The breach of an independent provision in a contract which is incidental to its main purpose and which does not go to the whole consideration, does not justify the cancellation of a contract"; cancellation is warranted only if the failure is "a total one, resulting in the defeat of the object of the contract, or rendering that object unattainable." Arrow Petroleum Co. v. Johnston, 162 F.2d 269, 276 (7 Cir.), *cert. denied,* 332 U.S. 817 (1947). *See also* LeRoy Dyal Co. v. Allen, 161 F.2d 152, 155 (4 Cir. 1947).

Defendant's other defenses to enforcement of the contract require little discussion. We do not think that the plain and unambiguous language of the 1968 secrecy agreement requiring the submission of *all* material relating to the CIA intended to be published can be abrogated by proof of an oral statement by a CIA induction officer that defendant would have the discretion to determine what information

was classified and thus what was required to be submitted for review. *See* Rock-Ola Manufacturing Corp. v. Wertz, 282 F.2d 208, 210 (4 Cir. 1960); *see also* Ross Engineering Co. v. Pace, 153 F.2d 35, 42-43 (4 Cir. 1946); G.L. Webster Co. v. Trinidad Bean & Elevator Co., 92 F.2d 177, 178-79 (4 Cir. 1937).

In the district court, defendant did not plead fraud as a defense in compliance with F.R. Civ. P. 8(c) and 9(b), and hence his argument that the statement of the CIA induction officer constituted fraud and vitiated defendant's obligation to submit material for prepublication review comes too late. In any event, the proof was insufficient to establish fraud. It did not show that the induction officer had knowledge of the falsity of his statement or that defendant acted in reliance on the statement. *See* Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623 (4 Cir.), *cert. denied,* 434 U.S. 923 (1977).

Overall, we perceive no valid defense to defendant's breach of contract.

IV.

A.

As one item of relief, the district court enjoined defendant from further breaching the terms and conditions of the 1968 secrecy agreement by failing to submit any manuscript or other writing containing information about the CIA to the CIA for review prior to publication on condition that the CIA complete its review within thirty days after submission and that it withhold approval for publication of only materials which are classified. We think that this relief was appropriate and we affirm the district court in this respect.

As we have shown, defendant's obligation under the secrecy agreements was to submit for prepublication review *all* information or material relating to the CIA, its activities or intelligence activities generally, and not, as the defendant contends, only materials which were classified. Defendant breached this obligation, and the district court found that the breach occurred "willfully, deliberately and surreptitiously." The evidence of record supports these findings and they are not clearly erroneous. The record shows also that defendant has prepared other writings and that he does not intend to submit them for prepublication review because he claims that they do not contain classified information.[6] The testimony of top CIA officials supports the district court's finding that defendant's failure to submit his book for prepublication review has "impaired CIA's ability to gather and protect intelligence relating to the security of the United States . . . ," and thus the government has suffered irreparable harm from defendant's breach and will suffer future irreparable harm if further breaches are not enjoined. These findings collectively support the grant of injunctive relief under our decision in *Marchetti I.*

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6 We reject defendant's argument that there is no evidence that he will not abide by his contract if we construe it to require prepublication review of all writings relating to the CIA and not merely those which divulge classified information. Our decisions in *Marchetti I* and *Marchetti II* as to the meaning of the secrecy agreements were well known before defendant undertook to publish his book, and he acted in flagrant violation of them. In any event, the danger to national security arising from an unauthorized publication of classified material is so great that we think that little proof of a probable future violation is required to justify injunctive relief.

B.

The substantial problem which this case presents is the correctness of the district court's imposing a constructive trust over the revenues from the book for the benefit of the government and ordering an accounting of those revenues. For the reasons which follow, we think that the imposition of a constructive trust was improper and that the government's sole remedy for breach of the contract should be the recovery of compensatory and punitive damages as the proof may support and as a jury may assess.[7]

At the outset we reiterate two factors on which all that follows is based: (1) there is in this case no present claim by the government that any classified material was published, and (2) defendant has a first amendment right to publish anything not classified. The second factor is constant; *Marchetti I* and *Marchetti II,* which we decline to reexamine, settle it. The first factor, however, is simply a lack of a claim on the part of the government; and if, on remand for good cause shown, the government should be allowed to amend its answer to the interrogatory and thereafter to prove that classified material was published, our conclusion with reference to the impropriety of imposing a constructive trust would be different.

To sustain the constructive trust, the government argues that the duty to submit writings for prepublication review

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7 As relief, the complaint prayed, *inter alia,* that "the defendant be required to pay to the plaintiff such damages as plaintiff has sustained as a result of the defendant's breach of contract." There was no specific prayer for punitive damages. On remand, the government may conclude to amend its complaint to pray recovery of punitive damages. Leave to do so shall be "freely given." F. R. Civ. P. 15(a) and (b).

was a fiduciary one, the breach of which, to the defendant's benefit, justifies the imposition of a constructive trust. *See* United States v. Carter, 217 U.S. 286 (1910); Community Counselling Service, Inc. v. Reilly, 317 F.2d 239 (4 Cir. 1963); Restatement (Second) of Agency § 403 (1958).[8] The defendant argues, however, that the duty to submit writings to prepublication review, while a contractual one, was not a fiduciary one, the breach of which justifies resort only to usual contract remedies of damages and, in an appropriate case, an injunction.

An employment contract can unquestionably create a fiduciary relationship. *See* Restatement (Second) of Agency § 376, Comment a (1958). But not all contractual duties on the part of the employee are fiduciary in nature. *Id.* § 400, Comment c. The 1968 secrecy agreement does not place convenient labels on which, if any, of defendant's duties are fiduciary ones. It is apparently conceded by defendant, and we agree, that both from the language of that contract and the circumstances under which it was made, that contract does create a fiduciary relationship with regard to the duty not to disclose classified material. But we do not think, having regard to the defendant's first amendment right to publish unclassified information, that the contract, even in the light of the circumstances under which it was made, creates any fiduciary relationship to submit writings for prepublication review which do not disclose classified information.[9] At most, with regard to unclassified information, there is only a contractual duty to submit writings to prepublication review, although it is one that, because of the risk to national security of an inadvertent or ill-advised publication of classified information, should be rigorously enforced by injunction and otherwise.

Although we conclude that the government is not entitled to a constructive trust, it is not without remedy. Defendant has clearly breached his contract and the government is entitled to damages for the breach. The district court, of course, found that the government's damages were not quantifiable; but even if the government is unable to prove the dollar value of the injuries to it flowing from the breach, it is entitled to nominal damages. And we think that it is entitled to more.[10]

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8 The government also asserts, somewhat tentatively, that a constructive trust may be imposed where legal remedies are inadequate. In view of our conclusion that the government is entitled to damages, *see* p.— *infra*, its remedies at law are not insufficient, and its contention must fail.

9 The government has not cited, nor have we found, any case holding that the duty to seek permission from an employer to disclose confidential information, however important to protect the confidential information, is in and of itself a fiduciary one. Rather, in the usual case, the fiduciary duty is not to disclose the information, the trade secret, or the like, or, as United States v. Kearns, __ F.2d __(D.C. Cir. 1978), not to misuse an official position.

10 Because the 1968 secrecy agreement as a general form of contract as well as a specific agreement with defendant was intended to have nationwide as well as international effect, we think that the rights of the parties are to be determined by federal common law and not merely the law of a state having some nexus to its formation. In determining what is federal common law, we look however to general authorities and to state law as a convenient source of reference for fashioning the applicable federal rule. *See* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

Ordinarily punitive damages are not recoverable for breach of contract. *See* Restatement of Contracts § 342 (1932); 11 S. Williston, Contracts § 1340 (3d ed. 1968); 5 A. Corbin, Contracts § 1077 (1951). But there are exceptions to the general rule where the acts constituting the breach also constitute the commission of a tort or are closely analogous thereto. *See* Williston, *supra* at 211-213; Corbin, *supra* at 367.[11] The usual examples are suits for breach of promise, suits against public service companies for breach of some contractual undertaking, and suits by a depositor against a bank for wrongfully failing to honor checks or drafts.[12] While the instant case does not fit nicely into any of these categories, we think nonetheless that it, too, should be deemed to constitute an exception to the general rule.

Viewed in the light most favorable to the government, the evidence in the case shows that prior to publication of his book defendant knew of his obligation to submit his manuscript for prepublication review. Not only did

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[11] The Restatement takes the position that there are no exceptions to the general rule and that any punitive damages in an action for breach of contract are sustainable only by the tort aspects of the action. *See* Restatement of Contracts § 342, Comment c.

[12] Based upon the law of Virginia, three district court cases in this circuit have recognized that punitive damages may be recovered in contract actions, at least where malice, fraud, or criminal indifference is shown: Matney v. First Protection Life Ins. Co., 73 F.R.D. 696 (W.D. Va. 1977) (suit on health insurance policy for failure to pay claim); Material Handling Industries, Inc. v. Eaton Corp., 391 F.S. 977 (E.D. Va. 1975) (suit by retailer against manufacturer for breach of contract and antitrust violation); National Homes Corp. v. Lester Industries, Inc., 336 F.S. 644 (W.D. Va. 1972) (recovery of punitive damages for breach of contract not dischargeable by defendant's bankruptcy). *See also* Wright v. Everett, 197 Va. 608, 90 S.E. 2d 855 (1956).

he possess this knowledge, but he acknowledged it to his former superiors at the CIA on a number of occasions, at the same time falsely representing to them that he would submit the manuscript for review prior to publication. Manifestly, had defendant's former superiors known that defendant's representations were falsely made, they could have instituted an action to enjoin publication without prior submission, and undoubtedly they would have prevailed. *See Marchetti I.* The evidence shows that the possibility of such an action reached the stage of consultation with the Department of Justice but the idea was abandoned because of defendant's misrepresentations. The government's evidence shows that although not quantifiable, the government suffered damage from publication without prepublication review.

From the evidence, a trier of the fact could well conclude that defendant's actions, and the government's reliance thereon, amounted to deceit, so that defendant's breach of contract has implications of a tort where punitive damages may be assessed.

> Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action "punitive" or "exemplary" damages, or what is sometimes called "smart money." Such damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.

W. Prosser, Law of Torts § 2 at 9 (4th ed. 1971) (footnotes eliminated). Indeed, in its brief the government makes clear

that its principal purpose in seeking recovery of monies from defendant is for the purposes both of punishing him and of deterring others. This is more properly the function of an award of punitive damages than of a constructive trust, since a constructive trust depends on the concept of unjust enrichment rather than deterrence and punishment. *See* D. Dobbs, Law of Remedies § 3.9 at 205 and § 4.3 at 246 (1973).

Further to define the punitive damages that the government may recover, we add these comments: Since the government contends and the district court found that the government's compensatory damages are not quantifiable and we view the function of punitive damages in a case such as this as the dual one of punishing the defendant and deterring others from like misconduct, we think it follows that there is no necessary correlation between the amount of punitive damages that may properly be assessed and the amount of compensatory damages that the government may prove. *See, e.g.*, Harrison v. United Transportation Union, 530 F.2d 558, 563 (4 Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); Bucher v. Krause, 200 F.2d 576, 587 (7 Cir. 1952), *cert. denied*, 345 U.S. 997 (1953); D. Dobbs, *supra*, § 3.09 at 210-11. Of course, in reaching that conclusion, we necessarily align ourselves with those courts which have held that punitive damages may be recovered so long as there is a legal injury to support the award of at least nominal compensatory damages, and we reject the view that punitive damages may not be recovered unless there is proof of substantial compensatory damages. *See* Harrison v. United Transportation Union, *supra*. In our view, any punitive damages in this case, since their purpose will be both to deter and to punish, should be assessed not only with a view to the defendant's culpability but also with a view to the defendant's financial circumstances both at the time that he committed the breach and when he will have realized all of the fruits of the breach. D. Dobbs, *supra*, § 3.9 at 218-19.

Of course what we have said about the factual aspects of the government's right to recover punitive damages stems from our viewing the record in the light most favorable to the government and in the light also of the district court's finding that the defendant breached the contract "willfully, deliberately and surreptitiously" for "personal financial gain." Defendant does not concede the correctness of these findings and defendant offered evidence in opposition thereto. Should the government press the claim to punitive damages which we conclude that it possesses, the award and assessment of damages, if other than nominal, must be made by a jury. To that extent, we agree with defendant that he is entitled to a jury trial. But even if the issue of compensatory and punitive damages is tried to a jury, the government is entitled to partial summary judgment on the fact that defendant breached his contract and that he is liable at least for nominal damages.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

HOFFMAN, District Judge, concurring in part and dissenting in part:

Wnile I unhesitatingly agree with the majority that Snepp's actions in breaking the contract were willful, deliberate and surreptitious, and that an injunction against future acts was appropriate, my disagreement lies in the rejection of the constructive trust established by the district court. I would affirm the district court in the entirety.

The majority apparently contends that there was no breach of Snepp's fiduciary duties in publishing non-classified material, even though the secrecy agreement provided that *all* material would first be submitted to the CIA for approval prior to publication. It is true that, in answer to an interrogatory requesting information as to classified material contained in Snepp's book, the government did state that *for the purposes of this litigation* the government does not contend that any information was classified. The government did *not* affirmatively state that the book did not contain classified material. The majority states that, on remand for good cause shown, the government may amend its answer to the interrogatory and prove that classified material was published. Once this has been done, it is available to the public and the media and the purpose of any classification has been destroyed.[1] If Snepp had followed the dictates of the *Marchetti* cases, the CIA would have been afforded the opportunity of segregating classified from unclassified material. Indeed, the majority states that if the classified material is disclosed on remand, then its conclusion as to

[1] In *United States v. Marchetti (Marchetti I),* 466 F. 2d 1309, 1311, Chief Judge Haynsworth, speaking for the court, said: "This case itself illustrates the point that the executive and judicial branches proceed on a case by case basis, the executive branch being dependent on the judiciary to restrict unwarranted disclosures."

the impropriety of imposing a constructive trust would be different. It seems to me that this is too great a penalty to exact where a constructive trust affords a ready solution to the problem and will act as a moderate deterrent, not only to Snepp but also to others similarly inclined.

Contrary to the view of the majority, the 1968 secrecy agreement does, in my judgment, establish a fiduciary relationship in that it requires *all* material to be submitted for review prior to publication. The majority agrees that a fiduciary relationship exists with regard to the duty not to disclose classified material, but expresses the view that this fiduciary relationship does not apply with respect to unclassified material. The 1968 secrecy agreement was no ordinary contract; it gave life to a fiduciary relationship and invested in Snepp the trust of the CIA. When Snepp accepted this trust, the disclosure of this same information from sources and methods available solely to the CIA did not release him from his fiduciary relationship to remain silent – at least until the CIA had an opportunity to review the material he intended to publish. Even without the secrecy agreement there existed a duty on Snepp not to reveal any confidential information obtained by reason of his employment by the CIA, even after he resigned. *Restatement (Second) of Agency,* §§ 395, 396, pp. 221-227.

The majority cites *Restatement (Second) of Agency,* § 400, comment c, as authority for the fact that not all contractual duties on the part of an employee are fiduciary in nature. I agree, but the very next sentence qualifies that comment by stating that "he [the employee] is not thereby liable for the profits made in such time if he does not use the facilities of the employer or *confidential information,* and does not act in competition with him." Assuredly, Snepp made use of confidential information in this case, whether classified or unclassified.

A constructive trust is defined as a relationship with respect to property subjecting the person by whom the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of property is wrongful and that he would be unjustly enriched if he were permitted to retain the property. *Restatement (Second) on Trusts*, § 1e, p. 5. Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises. *Restatement of Restitution*, § 160, p. 640. And in some situations "a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched. Thus where a person with knowledge of the facts wrongfully disposes of the property of another and makes a profit thereby, he is accountable for the profit and not merely for the value of the property of the other with which he wrongfully dealt." *Restatement of Restitution*, § 1e, p. 14.

Snepp's case fits the foregoing statements like a glove. All of the elements are present and it strikes me as improper that a court should literally require a demand for punitive damages, never demanded by the government, in order to accede to Snepp's demand for jury trial. Moreover, any judgment hereafter obtained against Snepp may indeed be worthless and the government's efforts to effect collection would go down the drain. The remedy afforded by the majority will operate as little or no deterrent in future cases.

I am uncertain as to whether the majority has attempted to establish a rule of punitive damages in federal law, or

whether the court relies upon Virginia law, the forum in which this case was tried. Footnote 12 suggests that Virginia law applies.[2] Assuming that state law applies, it

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[2] The Virginia law on punitive damages in contract actions is set forth in *Wright v. Everett*, 197 Va. 608, 90 S.E. 2d 855 (1956), in an action by the owners of real estate against a real estate agent to whom the responsibility of renting plaintiffs' home had been imposed. The agent agreed to investigate the credit reference of any prospective tenant and further agreed to transfer all utility bills to the name of the tenant. He did neither. A jury returned a small verdict for compensatory damages and $3,000 punitive damages. The action was brought in tort even though it arose out of privity of contract between the parties. In reversing the award for punitive damages, the Supreme Court of Appeals (now the Supreme Court) said:

> The general rule is that exemplary or punitive damages (with certain exceptions not here pertinent) are not allowed for breach of contract even though the action is *ex delicto* and not *in assumpsit*. (citations omitted)
>
> As a general rule, damages for breach of contracts are limited to the pecuniary loss sustained. According to the overwhelming weight of authority, exemplary damages are not recoverable in actions for breach of contract although there are dicta and intimations in some of the cases to the contrary. The rule does not obtain, however, in those exceptional cases where the breach amounts to an independent wilful tort, in which event exemplary damages may be recovered under proper allegations of malice, wantonness or oppression – as, for example, in actions for breach of marriage contracts. 15 Am. Jur., Damages, sec. 273, pp. 708 and 709.

Wright v. Everett, supra, has been applied and cited with approval in opinions by Judges Widener and Merhige, respectively, in *National Homes Corporation v. Lester Industries, Inc.*, 356 F. Supp. 644 (W.D. Va. 1972), and *National Handling Industries, Inc. v. Eaton Corp.*, 391 F. Supp. 977 (E. D. Va. 1975) – the first case pertaining to the issue as to whether a punitive damage judgment is dischargeable in

would subject the government, in similar cases, to the varying principles of state law applicable to punitive damages. Overlooked is the fact that different state courts limit, or even prevent altogether, any recovery of punitive damages even where a defendant is entirely culpable, as is Snepp in the instant case. As stated in *Dobbs, Remedies*, § 3.9, p. 208, the state rules have varying degrees of support, but all have some including (1) that the plaintiff may not recover punitive damages unless he can also recover compensatory damages; (2) that punitive damages must be commensurate with the amount of compensatory damages; (3) that equity will not entertain claims for punitive damages; (4) that mass disaster litigation against one or a small number of defendants should not yield punitive damages; and (5) that a principal is not vicariously liable for culpable torts of his servants.

During the pretrial proceedings in the present case, the government conceded that it could not prove any dollar damages and that it had no adequate remedy at law.[3] In

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bankruptcy; the second case involving a motion to strike a prayer for punitive damages as alleged in the complaint. Although *National Homes Corporation* reached the court of appeals on two different occasions, the propriety of an award for punitive damages was not pursued on appeal. *National Homes Corporation* was based upon a contract containing a covenant not to compete in which an injunction was awarded. Neither case considers the right to a jury trial.

While I assume that punitive damages grounded upon contract may be awarded in Virginia in exceptional cases, I do not believe that the government should be required or permitted to forum-shop for the state which applies the Virginia rule.

3 Numerous pretrial hearings were conducted with briefs being submitted as to varying questions. The district judge had directed the call of a jury panel for the trial on June 20, 1978. Fifty-six pages of the transcript are devoted to the arguments of counsel as to

federal courts located within states which require some recovery of compensatory damages before punitive damages are recoverable, the government would be left with a claim for nominal damages – not exactly an item which will deter former CIA employees and publishers who are anxious to profit commercially on national and international secrets available to the CIA. In fact, I express grave doubts whether the threat of punitive damages, assuming that they are recoverable under state law, will deter former employees who may be secretly or openly protected by the publisher, thereby protecting the former employees from any loss by reason of an adverse judgment.[4]

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whether any issues remained to be submitted to the jury. Appendix, Vol. II, pp. 4-60. The court made it clear that "if there is any issue of monetary damages other than an accounting, I will submit that to the jury." Appendix, Vol. II, p. 23. Snepp's counsel knew that monetary damages could not be established. His sole contention was that no injury flowed from the fact that Snepp's book had been published. Appendix, Vol. II, p. 25, 26, 31-33, 59, 60. The government responded that no showing of injury was required in this type of case. Appendix, Vol. II, p. 46, 51. Aside from the prayer for relief requesting that "defendant be required to pay to plaintiff such damages as plaintiff has sustained as a result of plaintiff's breach of contract," Joint Appendix, Vol. I, p. 5, it is abundantly clear that the damages sought by plaintiff were for "unjust enrichment." See Joint Appendix, Vol. I, p. 5, par. 21. It is also clear that this type of damage is merely another way of saying that equitable relief is sought on the ground of unjust enrichment. It was not until after hearing this lengthy argument that the court excused the jury. If, on remand, an amended complaint is filed, with the government electing to eliminate its claim for damages quoted above, it seems that, according to the majority opinion, a jury would not be required even on demand by defendant.

4 It is argued that punitive damages have not been shown to have any effect as deterrents. See *Morris, Rough Justice and Some Utopian Ideas*, 24 Ill. L. Rev. 730, 736 (1930).

The majority agrees that, with the exception of the issue of damages, Snepp's case presented no issue of fact for the jury to resolve. See footnote 4 of majority opinion. The complaint alleged that Snepp failed to submit the manuscript for prepublication review pursuant to the 1968 secrecy agreement and sought a declaration that Snepp had breached his contractual and fiduciary duties, for which the government was entitled to (1) damages in an unspecified amount for breach of contract, (2) an injunction against further breaches, (3) an accounting of the past and future revenues from the sale of the book (Snepp had already received $60,000 from the publisher), and (4) the imposition of a constructive trust over all past and future revenues. No claim was made for exemplary or punitive damages. It is true that Snepp demanded a jury trial. Since the majority holds that only the request for damages required a jury trial, the issue is whether, in a purely equitable action where there is no dispute of fact, an isolated claim for damages in an unspecified amount requires a jury to make such finding where the plaintiff tacitly abandons its claim for damages. In the first place, it is not a certainty that punitive damages are prohibited in an equity action, although the traditional rule is otherwise. *Dobbs, Remedies*, § 3.9, p. 211-12. Similarly, a few authorities have held that, by electing to go into equity, plaintiff waives any claim to punitive damages. *Karns v. Allen*, 135 Wis. 48, 115 N.W. 357 (1908).

If the opinion is intended to create a new federal law on punitive damages, I submit that, in the absence of statute, this cannot be done. The "bounty approach" has been applied in securities fraud situations, environmental cases under 33 U.S.C. § 411, antitrust cases involving treble damages under 15 U.S.C. § 15, and perhaps other like actions, but it has not been applied under federal law without the authority of a statute. I cannot believe that the

majority intended to create such a federal law on the subject.

Exemplary damages are not a favorite of the law, the power of giving them should be exercised with great caution, and they are properly confined within the narrowest limits. 22 *Am. Jur. 2d, Damages*, § 238. In general, there is no cause of action for exemplary damages alone. *Id.* § 241. There appears to be a split of authority as to whether nominal damages will support a claim for punitive damages. *Id.* § 242. While I agree that exemplary damages require a jury, when demanded, it is settled that if all the facts warranting such damages are admitted or established without reasonable controversy, there is nothing to submit to the jury on that subject *but the amount to be awarded. Id.* § 341. However, in this case the reversal in part will require a retrial of the entire proceeding to determine the extent of willfulness on Snepp's part in order to determine the amount of the punitive damage award.

We return to the fundamental question – was a jury required as demanded by Snepp in this purely equitable action upon which there is no controversy as to facts and liability in the eyes of the majority, bearing in mind that no punitive damages were requested?

If the allegations of the complaint disclose a cause of action which is simply equitable, a jury trial will not be directed merely because the prayer is for judgment for a sum of money. 47 *Am. Jur. 2d, Jury*, § 42. While the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings, *Dairy Queen v. Wood*, 369 U.S. 469 (1962), and courts are not bound by the pleadings or form of action, the determination of the essential character of the suit or remedy must be made by an examination of the entire pleadings and all issues.

47 *Am. Jur. 2d*, § 38. It is the real, meritorious controversy between the parties as shown by the whole case which is controlling. *Id.* § 38. In the present case the district court conducted several pretrial conferences and fully explored the pleadings and all issues prior to excusing the prospective jury panel. This action was not taken until the court was advised that no factual dispute existed.

Since the majority has properly held that there are no legal claims available which justify a jury trial except as to damages, I do not believe that *Dairy Queen v. Wood, supra*, and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), are applicable. In the latter case, filed as a declaratory judgment action, a counterclaim alleging treble damages for violation of the antitrust laws was filed by the defendant with a demand for jury trial. The district court scheduled the trial of the equitable claim in advance of the law action. Since the equitable interests asserted by plaintiff and the legal issues alleged by defendant were interlocked, the Supreme Court held that a jury trial was mandated. *Dairy Queen v. Wood* deals more specifically with the problem where the district court granted plaintiff's motion to strike the demand for jury trial where plaintiff and defendant had a contract with respect to the use of the trademark "Dairy Queen." Payments were not made by defendant in accordance with the terms of the contract and plaintiff cancelled. Thereafter, defendant continued to use the trademark and plaintiff sued alleging, *inter alia*, a default with an indebtedness in excess of $60,000. The complaint asked for an injunction, an accounting to determine the amount of money owing and a *judgment for that amount*, and an injunction pending accounting to prevent defendant from collecting any money from "Dairy Queen" stores. Defendant denied any breach of contract because of a subsequent oral agreement, laches and estoppel,

and denied any violations of antitrust laws. Defendant demanded a jury trial. There is language in *Dairy Queen* indicating that, where a money judgment is demanded, it presents a legal claim. However, in Snepp's case, while a claim for damages in an unspecified amount was contained within the complaint, it was later conceded by the government that it could not prove dollar damages and, in substance and fact, the claim for damages was abandoned. Manifestly, the only remedy available to the government was the establishment of a constructive trust and an injunction. I cannot believe that the right to nominal damages constitutes an adequate remedy at law; nor do I believe that a court may force a plaintiff to seek punitive damages under the guise of saying that this is an adequate remedy at law.

Since this case, as finally presented after an exhaustive discussion of the various issues, was purely an equitable action, it seems proper to invoke the "clean-up" doctrine as discussed in *Katchen v. Landy*, 382 U.S. 323 (1966), which permitted, in a bankruptcy proceeding, a judgment for the surrender of a preference in the face of timely jury demand, as being within the traditional equity powers to afford complete relief even though there may exist legal remedies.

Finally, what bothers me appreciably is the effect upon the proper administration of justice. In future cases, if the majority opinion is accepted, district courts, wherever there is a demand for jury trial in an equitable action, will be required to empanel a jury because of the possibility that it may be appropriate to award punitive damages even though plaintiff makes no demand for same. Although the majority does not specifically so state, it apparently stands for the proposition that the government has an adequate remedy at law, either through nominal damages or punitive damages, or both. The remedy at law which will defeat

equitable jurisdiction of federal courts must be a remedy at common law. 47 *Am. Jur. 2d*, § 41. Clearly, in my opinion, there was no remedy at common law available to the government in Snepp's case.

I join the majority in concluding that, in light of the two *Marchetti* cases, the First Amendment claim is patently frivolous.

With all due respect, I must dissent in part.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA,
Plaintiff,

v. Civil Action No.

FRANK W. SNEPP, III,
Defendant.

_____/

COMPLAINT

The United States of America, by its undersigned attorneys, brings this civil action for declaratory and injunctive relief, monetary damages and an accounting of the defendant's profits and other gains hereinafter described, and for its complaint against the defendant alleges as follows:

1. This Court has jurisdiction over the subject matter of this action pursuant to Title 28, United States Code, Section 1345.

2. The defendant, Frank W. Snepp, III, is a resident of the state of Virginia within the jurisdiction of this Court.

3. Venue is proper in the Eastern District of Virginia.

4. This is a civil action arising from the breach of the terms and conditions of an Agreement entered into by defendant Snepp as a condition of his becoming an employee of the Central Intelligence Agency (hereinafter referred to at times as the Agency), which Agreement constitutes a contract between defendant Snepp and the United States, and the

breach of the defendant's fiduciary duty to the Agency, by the failure of defendant Snepp to submit the manuscript of a non-fiction book, *Decent Interval,* for pre-publication review by the Agency.

5. The Central Intelligence Agency, an agency of the United States, was established by the National Security Act of 1947. Under the provisions of the Act and the implementing provisions of Executive Order 12036 and predecessor Executive Orders, the Agency is authorized to collect intelligence information relating to national security and to correlate, evaluate, and disseminate within the United States Government, intelligence relating to national security.

6. The position of Director of Central Intelligence was also established by the National Security Act of 1947. The Director serves as head of the Agency. Section 102(d)(3) of the Act, Title 50, United States Code, Section 403(d)(3), charges the Director with the responsibility for "protecting intelligence sources and methods from unauthorized disclosure."

7. Personnel employed by the Central Intelligence Agency, prior to beginning their official duties, as a condition of employment by the Agency and as a condition of being granted access to classified information, are required to execute an Agreement, such as is attached as Exhibit A. This requirement is in the furtherance of the statutory responsibility to protect intelligence sources and methods from unauthorized disclosure.

8. On September 16, 1968, prior to commencement of his official duties as an employee of the Agency, defendant Snepp entered into an Agreement with the Agency. A true and correct copy of that Agreement is attached to the Complaint as Exhibit A.

9. Defendant Snepp was employed by the Agency from September 16, 1968, until he resigned, effective January 26, 1976. During the period of his Agency employment, defendant Snepp served two tours of duty in South Vietnam. The dates of his tours of duty were from June 2, 1969 to June 21, 1971 and from October 4, 1972 to April 29, 1975.

10. As a condition of his employment, and under the terms of the Agreement, defendant Snepp was required to submit to the Agency for its review any information concerning the Agency or its activities intended for publication, which was gained as a result of his employment, prior to the publication of such information.

11. During the course of his Agency employment, defendant Snepp was assigned to various positions of trust, including those set forth in paragraph 9, *supra,* and was granted frequent access to classified information, including information regarding intelligence sources and methods. In assigning defendant Snepp to such positions, and granting defendant Snepp access to such information, the Agency relied on the expectation that defendant Snepp would respect the rights and obligations created by the Agreement, including the Agency's rights of pre-publication review.

12. Defendant Snepp recognized and agreed in the Agreement that the obligations undertaken by him in executing that Agreement would remain valid and binding upon him after the termination of his employment with the Central Intelligence Agency.

13. By virtue of the nature of his Agency employment, defendant Snepp had a fiduciary obligation to protect classified information and information pertaining to intelligence sources and methods from unauthorized disclosure and to submit to the Agency for its review any materials concern-

ing the Agency or its activities intended for publication, which was gained as a result of his employment, prior to the publication of such materials. This obligation remained and continues to remain valid and binding on defendant Snepp after the termination of his employment.

14. At no time has the Central Intelligence Agency, expressly or impliedly, released defendant Snepp from the terms and conditions of the aforesaid Agreement and/or his fiduciary obligations. Nor at any time did defendant Snepp ever make a request of the Director of Central Intelligence or of his authorized representative, to be released from his contractual and/or fiduciary obligations.

15. In addition to acknowledging and undertaking his obligations by entering into the Agreement, defendant Snepp repeatedly expressed his intention to Agency representatives to abide by the terms of the Agreement, including the submission of the manuscript, notes, or drafts, in any form, of any writing containing information gained as a result of his employment to the Agency for review prior to publication of that material and the Agency relied upon on these representations to its detriment and to the defendant's unjust enrichment.

16. Notwithstanding his stated acceptance of the terms and conditions of the aforesaid Agreement, the defendant has intentionally breached these terms and conditions.

17. Defendant Snepp submitted to Random House, Inc., for publication a non-fiction book entitled *Decent Interval.* The book concerns the activities of the Agency in South Vietnam and elsewhere and indicates on its face that it is based in large part on information obtained by defendant Snepp in the course of his Agency employment, including the tours of duty referred to in paragraph 9, *supra.*

18. In November, 1977, Random House, Inc., published and placed in the stream of commerce for ultimate retail sale the aforementioned non-fiction work, *Decent Interval.*

19. At no time did defendant Snepp submit manuscripts, in any form, which relate to the non-fiction book entitled *Decent Interval,* to the Agency for pre-publication review in accordance with the Agreement and/or defendant's fiduciary obligations.

20. Defendant Snepp has breached his contract, the Agreement, with the United States and/or his fiduciary duty to the same by failing to submit his manuscript for pre-publication review.

21. As a result of defendant Snepp's breaches of his contractual and/or fiduciary duties, the United States has been damaged, *inter alia,* by the undermining of confidence and trust in the Agency, thereby hampering the ability of the Agency and of the Director of Central Intelligence to perform their respective statutory duties as set forth in paragraphs 5 and 6, *supra,* and defendant Snepp has been unjustly enriched in the amount of profits, advances, royalties and other advantages resulting from the publication of the non-fiction work *Decent Interval.*

22. In addition to the acts specified above, defendant Snepp has engaged in a course of conduct evidencing a propensity to commit further breaches of his contractual and/or fiduciary duties.

23. As a consequence of defendant Snepp's breach of the Agreement and his fiduciary duties by failing to submit the non-fiction book, *Decent Interval,* for pre-publication review by the Agency, and statements made by defendant Snepp subsequent to the publication of *Decent Interval,* the threat exists that defendant Snepp will commit further

violations of his contractual and fiduciary obligations, and that such future violations will cause the United States to suffer irreparable injury for which it has no adequate remedy at law.

WHEREFORE plaintiff prays:

A. That this Court declare that defendant Snepp has breached his contract, the Agreement, with the Agency and breached his fiduciary obligations by failing to submit the manuscript, notes, or drafts, in any form, of *Decent Interval* for pre-publication Agency review.

B. That the defendant be required to pay to the plaintiff such damages as plaintiff has sustained as a result of the defendant's breach of contract.

C. That as a conseuqence of the defendant's breach of fiduciary duty and unjust enrichment, defendant Snepp be ordered to account for all gains, profits, royalties and other advantages derived by the defendant from the sale, serialization, republication rights, in any form, movie rights or other distribution for profit of the work entitled *Decent Interval.*

D. That the Court impose a constructive trust over the aforementioned gains, profits, royalties, and other advantages derived by the defendant as specified in the preceding paragraph.

E. That the Court order the defendant to relinquish the proceeds accounted for to the plaintiff.

F. That this Court grant to plaintiff such other relief as this Court may deem just and proper, including, but not limited to, an order enjoining any further violation of defendant's contractual and/or fiduciary duties and plaintiff's costs herein.

/s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General

/s/ Irwin Goldbloom
IRWIN GOLDBLOOM
Deputy Assistant Attorney General

/s/ William B. Cummings
WILLIAM B. CUMMINGS
United States Attorney

/s/ David J. Anderson
DAVID J. ANDERSON

/s/ Elizabeth Gere Whitaker
ELIZABETH GERE WHITAKER

/s/ Brook Hedge
BROOK HEDGE
Attorneys, Civil Division
United States Department of Justice
10th and Constitution Ave., N.W.
Washington, D.C. 20530
Tel: (202) 739-4300 or
(202) 739-3529

APPENDIX D

SECRECY AGREEMENT

1. I, Frank W. Snepp, III, understand that upon entering on duty with the Central Intelligence Agency I am undertaking a position of trust in that Agency of the Government responsible to the President and the National Security Council for intelligence relating to the security of the United States of America. I understand that in the course of my employment I will acquire information about the Agency and its activities and about intelligence acquired or produced by the Agency.

2. I have read and understand the provisions of the Espionage Act, Title 18, USC, secs. 793 and 794, and I am aware that uanuthorized disclosure of classified information relating to the national defense may subject me to prosecution for violation of that Act, whether such disclosure be made while I am an employee of the Central Intelligence Agency or at any time thereafter.

3. In addition, however, as I am undertaking a position of trust, I have a responsibility to the Central Intelligence Agency not to disclose any classified information relating to the Agency without proper authorization. I undertake, therefore, not to discuss with or disclose to any person not authorized to hear it such information relating to the Central Intelligence Agency, its activities, or to intelligence material under the control of the Agency. I further understand that this undertaking is a condition of my employment with the Central Intelligence Agency, that its violation may subject me to immediate dismissal for cause or other appropriate disciplinary action, and that this undertaking shall be equally binding upon me after my employment with the Agency as during it.

4. I understand that the burden is upon me to ascertain whether or not information is classified and if so, who is authorized to receive it, and, therefore, I will obtain the decision of authorized officials of the Agency on these points prior to disclosing information relating to the Agency, and failure to obtain such a decision will be grounds for my dismissal.

5. I understand that my unauthorized action or utterance in the nature of a publication or which would reasonably be expected to result in publicity on intelligence or intelligence activities would be in violation of Government and Agency regulations and would be grounds for my dismissal.

6. I understand that for all grievances and complaints there are established procedures within the Agency permitting appeal by any employee of the Agency and to carry any such grievance or complaint outside the Agency will be considered a violation of the undertaking set forth above in paragraph 3. If the appeal procedures are inadequate in any situation, I am aware that the Inspector General is at all times available to any employee with a legitimate criticism, grievance, or complaint.

7. I further understand and agree that my employment by the Central Intelligence Agency is conditioned upon my understanding of and strict compliance with CIA Security Regulations, and the appendices thereto.

8. Inasmuch as employment by the Government is a privilege not a right, in consideration of my employment by CIA I undertake not to publish or participate in the publication of any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of my employment by the Agency without specific prior approval by the Agency. I understand

that it is established Agency policy to refuse approval to publication of or participation in publication of any such information or material.

9. I agree that all information or intelligence acquired by me in connection with my official duties with the Central Intelligence Agency remains the property of the United States of America, and I will surrender, upon demand by an appropriate official of the Agency or upon separation from the Agency, any material relating to such information and intelligence in my possession.

10. I take the obligations set forth above freely, without any mental reservations or purpose of evasion.

IN WITNESS WHEREOF, I have set my hand and seal this 16 day of Sept, 1968.

/s/ Frank W. Snepp III (Seal)

Witness:

16 September 1968
Date

/s/ Olga K. Harris

APPENDIX E

TERMINATION SECRECY AGREEMENT

1. I, Frank W. Snepp, III, am about to terminate my association with the Central Intelligence Agency. I realize that, by virtue of my duties with that agency, I have been the recipient of information and intelligence that concern the present and future security of the United States of America.

2. I have read and understand the provisions of the espionage laws (sections 793, 794, and 798 of Title 18, United States Code) and I am aware that unauthorized disclosure of classified information relating to the national defense may subject me to prosecution for violation of those laws. Further, I am aware that the National Security Act of 1947 specifically requires the protection of intelligence sources and methods from unauthorized disclosure.

3. I will never divulge, publish, or reveal by writing, word, conduct, or otherwise any classified information, or any information concerning intelligence or CIA that has not been made public by CIA, to any unauthorized person including, but not limited to, any future governmental or private employer or official without the express written consent of the Director of Central Intelligence or his representative.

4. I do not now have in my possession, custody, or control, nor am I retaining or taking away from CIA, any classified or unclassified documents or materials that are the property of CIA, or the custodial responsibility of CIA, having come into my possession as a result of my duties with CIA or otherwise.

5. I have been invited to submit in writing any monetary claims that I may have against CIA or the United States Government that may in any way necessitate the disclosure

of information described herein. I have been advised that any such claims will receive full legal consideration. In the event, however, that I am not satisfied with the decisions of CIA concerning any present or future claims I may submit, I will not take any action to obtain satisfaction without prior written notice to CIA, and then only in accordance with such security advice as CIA will furnish me.

6. During my exit processing and during my period of employment with the Central Intelligence Agency, I have been given an opportunity to report all information about the Agency, its personnel, and its operation that I consider should receive official cognizance. Therefore, I am not aware of any information that it is my duty, in the national interest or otherwise, to disclose to the Central Intelligence Agency, nor am I aware of any violations or breaches of security that I have not officially reported, except as set forth on attachments to this sheet.

7. I will report without delay to the appropriate CIA officials, or the Federal Bureau of Investigation, any incident wherein an attempt is made by any unauthorized person to solicit classified information from me.

8. I have been advised that in the event I am called upon by the properly constituted authorities to testify or provide information that I am pledged hereby not to disclose, I will notify CIA immediately; I will also advise said authorities of my secrecy commitments to the United States Government, and I will request that my obligation to testify be established before I am required to do so.

9. I have read and understand the contents of this agreement and voluntarily affix my signature hereto with the full knowledge that it was executed for the mutual benefit of myself and the United States Government. I have read sec-

tion 1001 of Title 18, United States Code and am aware that the making of a false statement herein or otherwise may be punished as a felony. With this understanding, I state that the information I have given is, to the best of my knowledge and belief, correct and complete, and agree that it may be used by the Government in carrying out its duty to protect the security of information that affects the national defense of the United States.

10. I understand that this agreement will be retained in the files of the Central Intelligence Agency for its future use or for reference by me at any time in the future that I may be requested or ordered to testify or disclose any of the matters included within the scope of this agreement.

/s/ Frank Snepp 23 January '76
Signature–Date

WITNESS:

/s/ (Employee name)
Signature-Date 23 January 1976

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Civil Action
	)	No. 78-92-A
FRANK W. SNEPP, III, Defendant.	)	

AFFIDAVIT OF FRANK W. SNEPP, III

I, Frank W. Snepp, III, state the following facts.

1. Since resigning from the Central Intelligence Agency in January, 1976 to the present, I have sought to make my living as a professional writer and I hope to continue in this pursuit.

2. I have retained an author's agent who has made inquiries on my behalf as to publication possibilities.

3. Two national magazines, *The Atlantic Monthly* and *Esquire*, have expressed an interest in publishing articles written by me. (Letters from these publications are attached hereto as Exhibits A and B).

4. On September 7, 1978, I completed work on an essay to the point where I am ready to submit it to publishers for possible publication. This essay is a reflection on how government officials compromise their personal beliefs and views in order to stay in step with official policies and perceptions of events. The essay includes a number of vignettes concerning State Department officials whom I knew

in Vietnam while serving with the CIA. It also includes reflection on the compromises which I made while in government service. It additionally includes a discussion of the final days of U.S. involvement in Vietnam. This discussion has already been made a part of the public record in this case through my affidavit of March 30, 1978, my deposition, and my testimony in open court. This essay does not contain any classified information. The essay does, however, fall within the terms of the Court's Order of August 2, 1978 because it contains "information which relates to the Central Intelligence Agency [and] its activities. . . which [I] gained during the course of or as a result of [my] employment with the Central Intelligence Agency." *Id.*, ¶(4).

5. On September 10, 1978 I completed work on a short story to the point where I am ready to submit a draft to publishers for consideration. (I had been working simultaneously on both this short story and the essay described above). This story is a fictional work, set in Saigon, concerning a romantic relationship between a CIA officer and a French woman. The story is based on observations which I made while serving with the CIA in Vietnam. This short story does not contain any classified information. However, this story falls within the terms of the Court's Order of August 2, 1978 because it contains information "which relates to the Central Intelligence Agency, its activities [and] intelligence activities generally . . . which [I] gained during the course of or as a result of [my] employment with the Central Intelligence Agency." *Id.*, ¶(4).

6. Because the Court's Order of August 2, 1978 prohibits me from submitting either the essay or the short story described above to the publishers who have expressed interest in accepting my work without first submitting these writings to the CIA for review, the Court's Order imposes

a real and present burden on my First Amendment right to publish and my Fifth Amendment right to practice my chosen profession.

7. If either of the two articles described above contained classified information or if I plan to write any other manuscripts which contain classified information, I would of course submit such material to the CIA so that the Agency could determine whether it would be possible to declassify such matters. Indeed, I am aware that if I publish information which damages the national defense or foreign relations, I could be subject to criminal prosecution.

I declare this eleventh day of September, 1978, under penalty of perjury that the foregoing statements are true and correct.

/s/ Frank Snepp
Frank W. Snepp, III

APPENDIX G

CENTRAL INTELLIGENCE AGENCY
Washington, D.C. 20505

14 JAN 1974

Honorable Roy L. Ash, Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Ash:

This submits proposed legislation in accordance with Office of Management and Budget Circular No. A-19, revised. Enclosed are six copies of a draft bill, "To amend the National Security Act of 1947, as amended." Also enclosed are copies of a sectional analysis, a comparison with existing law, cost analysis, and drafts of the letters of transmittal to the President of the Senate and the Speaker of the House of Representatives.

The proposed legislation amends Section 102 of the National Security Act of 1947 by adding a new subsection (g) defining "information relating to intelligence sources and methods" as a separate category of classified information to be accorded statutory recognition and protection similar to that provided "Restricted Data" under the Atomic Energy Act. The proposed law grants the Director of Central Intelligence the authority to issue rules and regulations limiting the dissemination of information related to intelligence sources and methods of collection and provides for a criminal penalty for the disclosure of such information to unauthorized persons and for injunctive relief.

The continued effectiveness of the United States foreign intelligence collection effort is dependent upon the adequate

protection of the intelligence sources and methods involved. In recognition of this, Congress, under Section 102(d)(3) of the National Security Act of 1947, made the Director of Central Intelligence responsible for the protection of intelligence sources and methods from unauthorized disclosure. Unfortunately, there is no statutory authority to implement this responsibility. In recent times, serious damage to our foreign intelligence effort has resulted from unauthorized disclosures of information related to intelligence sources and methods. The circumstances of these disclosures precluded punitive criminal action.

In most cases, existing law is ineffective in preventing disclosures of information relating to intelligence sources and methods. Except in cases involving communications intelligence, no criminal action lies against persons disclosing classified information without authorization unless it is furnished to a representative of a foreign power or the disclosure is made with intent to harm the United States or aid a foreign power. It also requires the revelation in open court of confirming or additional information of such a nature that the potential damage to the national security precludes prosecution. Furthermore, prevention of disclosure in order to avoid serious damage to the intelligence collection effort better serves the national interest than punishment after disclosure; however, there is no existing statutory authority for injunctive relief.

The greatest risks of disclosure come from persons who are entrusted with information relating to intelligence sources and methods through a privity of relationship with the U.S. Government. When such persons, without authorization, disclose information to representatives of the public media, it receives wide publication, and, of course, is revealed to the foreign nations which may be the subject of or otherwise

involved in the intelligence activities, leading to their termination as well as political or diplomatic difficulties.

A fully effective security program might require legislation to encompass the willful disclosures of classified information by all persons knowing or having reason to know of its sensitivity. However, in order to limit the free circulation of information in our American society only to the degree essential to the conduct of a national foreign intelligence effort, this legislation proposes that prosectuion be provided only for persons who have authorized possession of such information or acquire it through a privity of relationship to the Government. Other persons collaterally involved in any offense would not be subject to prosectuion. Further, disclosures to Congress upon lawful demand would be expressly excluded from the provisions of the proposed law.

In order to provide adequate safeguards to an accused, while at the same time preventing damaging disclosures during the course of prosecution, subsection (g)(5) provides for an *in camera* determination by the court of the reasonableness of the designation for limited distribution of the information upon which prosecution is brought.

Finally, in order to prevent disclosures, subsection (g)(6) provides statutory authority for the enjoinder of threatened acts in violation of the subsection upon a showing by the Director of Central Intelligence that any person is about to commit a violation of the subsection or any rule and regulation issued thereunder.

Your advice is requested as to whether there is any objection to the submission of the proposed legislation to the Congress from the standpoint of the Administration's program.

Sincerely,

W. E. Colby
Director

Enclosures

cc: Chairman and Members of PFIAB
Chairman and Members of NSCIC
Members of USIB

Supreme Court, U. S.
FILED
AUG 17 1979
MICHAEL RODAK, JR., CLERK

No. 78-1871

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRANK W. SNEPP, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT E. KOPP
FREDERIC D. COHEN
Attorneys
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1871

FRANK W. SNEPP, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18a-50a) is reported at 595 F. 2d 926. The opinion of the district court (Pet. App. 1a-14a) is reported at 456 F. Supp. 176.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1979. The petition for a writ of certiorari was filed on June 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below properly enforced a contract in which petitioner, as a condition of his employment with the Central Intelligence Agency, agreed not to publish "any information or material relating to the Agency, its activities or intelligence activities generally," without specific prior approval by the Agency.

2. Whether punitive damages may be assessed against a former Central Intelligence Agency employee who "willfully, deliberately and surreptitiously" and "for personal financial gain" breached a contractual secrecy agreement by publishing information concerning the Agency without first submitting the material to the Agency for review.

STATEMENT

From September 1968 through January 1976, petitioner was employed by the Central Intelligence Agency in a capacity that granted him frequent access to classified information (Pet. App. 3a-4a, 20a-22a). Before beginning his employment with the Agency, petitioner signed a secrecy agreement in which he acknowledged that he would occupy "a position of trust in the Agency of the Government responsible to the President and the National Security Council for intelligence relating to the security of the United States" (*id.* at 3a, 58a). As a condition of employment, petitioner promised "not to disclose any classified information relating to the Agency without proper authorization" (id. at 58a). He further promised that, before revealing any information concerning the Agency, he would obtain the Agency's decision on "whether or not information is classified and if so, who is authorized to receive it" (*id.* at 59a). Finally, petitioner agreed "not to publish or participate in the publication of any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment by the Agency without specific prior approval by the Agency" (*ibid.*).[1]

---

[1]When petitioner ended his association with the Agency in 1976, he signed a document entitled "Termination Secrecy Agreement" in which he stated (Pet. App. 61a):

> I will never divulge, publish, or reveal by writing, word, conduct, or otherwise any classified information, or any information concerning intelligence or CIA that has not been made public by CIA, to any unauthorized person including, but not limited to, any future governmental or private employer or official without the express written consent of the Director of Central Intelligence or his representative.

At the time he signed this agreement, petitioner was advised that it imposed the same responsibilities as those he had accepted under the 1968 agreement (*id.* at 9a, 22a).

During the course of his employment with the Agency, petitioner served two tours of duty in South Vietnam (Pet. App. 4a). He was there from June 1969 to June 1971 and again from October 1972 to April 1975 (*ibid.*). The latter period included the American withdrawal from Vietnam and the end of the Agency's operations in that country (*id.* at 21a). Allegedly because he was dissatisfied with the Agency's conduct of these affairs, petitioner decided to write a book on the subject (*ibid.*). Although he apparently did not conceal the fact that he was preparing a manuscript based on his experiences in Vietnam, petitioner kept his negotiations with a publisher secret (*id.* at 5a-6a, 22a). On a number of occasions, he assured Agency officials (including the Director of Central Intelligence) that he would submit his manuscript for pre-publication review, in accordance with the agreement he had signed when he began working for the Agency (*id.* at 5a-6a, 22a-23a). Contrary to his secrecy agreement and these assurances, however, petitioner did not submit his manuscript for review but caused it to be published in November 1977 without approval from the Agency (*id.* at 4a, 6a, 23a). The book was entitled *Decent Interval.*

In February 1978, the government filed this suit in the United States District Court for the Eastern District of Virginia. The complaint (Pet. App. 51a-57a) alleged that petitioner breached his contractual and fiduciary duties to

the Agency by permitting his manuscript to be published without submitting it for pre-publication review (*id.* at 55a). As a consequence, the complaint stated, petitioner had undermined confidence and trust in the Agency and had hampered the Agency's ability to perform its statutory duties (*ibid.*). The complaint sought a declaration that petitioner had violated his contractual and fiduciary obligations to the Agency and an injunction against future violations. The complaint also sought damages for the harm suffered by the Agency and imposition of a constructive trust over all gains derived by petitioner from the publication, sale, and other distribution of *Decent Interval* (*id.* at 56a). The complaint did not allege that petitioner had published classified information but sought only to enforce the Agency's contractual right to review the manuscript to determine whether it contained such information.

Following a non-jury trial, the district court found petitioner liable for breach of contract and granted the relief requested (Pet. App. 1a-17a). Relying on *United States* v. *Marchetti*, 466 F. 2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972), the court sustained the validity of the 1968 secrecy agreement and enjoined petitioner from publishing information relating to the Agency and its intelligence activities without first submitting such material to the Agency for review (Pet. App. 16a-17a). The court also imposed a constructive trust, for the benefit of the United States, over all revenues derived by petitioner from the publication and sale of *Decent Interval* (*id.* at 15a).

The court of appeals affirmed the district court's ruling with respect to the validity of the secrecy agreement and petitioner's breach thereof (Pet. App. 19a-31a). The court also upheld the award of injunctive relief requiring petitioner to submit any future manuscripts within the agreement for pre-publication review (*id.* at 31a-32a). The court declined, however, to approve the imposition of a

constructive trust over petitioner's earnings from the publication of *Decent Interval* (*id.* at 33a-35a). The court explained that its conclusion would have been different had the government alleged and proved that petitioner published classified material without proper authorization. But, in the absence of such proof, the court refused to find that the 1968 agreement created a "fiduciary relationship to submit writings for prepublication review" (*id.* at 34a). Without such a relationship, the court held, the equitable remedy of a constructive trust was inappropriate.

The court of appeals concluded (Pet. App. 36a-39a), however, that, on a proper factual showing, the government would be entitled to recover punitive damages from petitioner. Although the court acknowledged that punitive damages ordinarily are not recoverable for breach of contract (*id.* at 36a), it stated that the evidence at trial, viewed in the light most favorable to the government, was sufficient to permit a trier of fact to find that petitioner had falsely represented to Agency officials that he would comply with his contractual obligation to submit his manuscript for pre-publication review and that the Agency had relied on these false representations in determining not to take legal action to enjoin the publication of *Decent Interval* (*id.* at 36a-37a). Under these circumstances, the court held, petitioner's breach of contract may also have embraced the tort of deceit, for which punitive damages may properly be assessed (*id.* at 37a).

The court ruled that the amount of punitive damages that the government may recover does not bear any necessary relationship to the amount of compensatory damages that can be proved, but rather should depend on petitioner's culpability and financial circumstances (Pet. App. at 38a). It therefore remanded for a jury trial on

these disputed factual issues and, in the event those issues are resolved favorably to the government, for a jury determination of the amount of punitive damages that should be awarded (*id.* at 39a).

Judge Hoffman dissented in part (Pet. App. 40a-50a). He agreed with the finding of liability and the grant of injunctive relief but disagreed with the majority's discussion of punitive damages. In Judge Hoffman's view, the 1968 secrecy agreement did establish a fiduciary relationship by virtue of its requirement that *all* material relating to the Agency, be submitted for pre-publication review. In light of the government's conceded difficulty in proving compensatory damages, Judge Hoffman concluded that imposition of a constructive trust over petitioner's gains from *Decent Interval* was an appropriate remedy. He therefore would have affirmed the district court's judgment in its entirety.

ARGUMENT

1. Petitioner challenges the validity of the 1968 secrecy agreement on two grounds. First, he maintains (Pet. 9-10) that the agreement, and its judicial enforcement, lack the statutory authorization that is necessary to support any restriction on the First Amendment rights of government employees. Second, he contends (Pet. 11) that public employment may not be conditioned on a waiver of First Amendment rights. Neither argument merits review by this Court.

a. Petitioner's complaint about the lack of statutory authority for the agreement he signed in 1968 ignores 50 U.S.C. 403(d)(3), which expressly states that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." In the exercise of this responsibility, the

Director may prescribe reasonable requirements designed to safeguard against the improper release of classified information. One such measure is the requirement that all Agency employees agree not to publish information concerning the Agency's activities or intelligence sources and methods generally, without first submitting such materials to the Agency for review. By examining these materials before publication, the Director may prevent the unauthorized disclosure of classified information and thereby protect "intelligence sources and methods."[2]

Under 28 U.S.C. 1345, the federal district courts have "original jurisdiction of all civil actions, suits or proceedings commenced by the United States * * *." And, as this Court stated in *Wyandotte Co.* v. *United States*, 389 U.S. 191, 201 (1967), "the United States may sue to protect its interests," including its proprietary or contractual rights. Accordingly, there can be no serious question about the district court's statutory authority to entertain the government's complaint for breach of contract and to award injunctive and monetary relief in accordance with governing remedial principles.

b. The Agency's requirement that prospective employees agree to a pre-publication review procedure

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[2]Executive Order No. 12065, 43 Fed. Reg. 28949, 28950-28951 (1978), restricts classification authority to actively employed government officials. Moreover, the Director and other Agency supervisory officials are the persons best suited to determine whether particular items of information are classified. Certainly they are better situated to make such decisions than persons who have already left the Agency's employ and therefore may be unaware of changed circumstances that critically affect the significance of certain public disclosures. As the court of appeals recognized in *United States* v. *Marchetti*, 466 F. 2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972): "What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context."

before they receive access to classified information does not violate the First Amendment. While "unreasonable" conditions may not be attached to public employment (*Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967)), a public employee may be subjected to greater restraints than ordinary citizens. As this Court has observed in an analogous context:

> the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering v. *Board of Education*, 391 U.S. 563, 568 (1968).[3]

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[3]In *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548 (1973), and *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), the Court held that a variety of legitimate government goals—the impartial execution of the federal laws, the prevention of the use of a large, publicly paid work force for political purposes, and the preservation of a merit system of Civil Service employment—justify the incidental restrictions that the Hatch Act, 5 U.S.C. 7324(a)(2), imposes on the First Amendment rights of public employees. (The Hatch Act has consistently been interpreted to prohibit government employees from publishing any letter or article supporting or opposing any political party or candidate. See 413 U.S. at 579-580; 5 C.F.R. 733.122(b)(10), (12).) Likewise, in *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976), the Court observed that even a significant interference with protected rights of political association "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." See also *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972); *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *NAACP* v. *Alabama, ex rel. Patterson*, 357 U.S. 449, 463 (1958).

The Central Intelligence Agency, whose principal function concerns the most sensitive and confidential matters regarding the national defense and the Executive's conduct of foreign policy, "has interests as an employer" that differ "significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Those interests justify the conditioning of employment on a promise by the employee not to make unauthorized disclosure of classified information that comes into his possession as a result of his employment. See *United States* v. *Marchetti*, *supra*, 466 F. 2d at 1316-1317 (secrecy agreements "are entirely appropriate to a program in implementation of the congressional direction" prohibiting the unauthorized disclosure of intelligence sources and methods).

By the same token, employment may properly be conditioned on a promise that intelligence-related materials intended for publication will be submitted first to the Agency for review. Only in this way can the Agency hope to prevent the compromise of important governmental functions that would result if classified information were revealed. The burden on an employee's First Amendment rights is small; under the district court's decision (Pet. App. 17a), the Agency must complete its review of submitted materials within 30 days and must approve the publication of all nonclassified material. The minimal restrictions imposed by the secrecy agreement that petitioner signed in 1968 are amply justified by the risk of substantial harm to the national interest that would be created by the unauthorized disclosure of classified information obtained by an Agency employee in the course of his employment.

2. Relying upon his submission that the Agency may not constitutionally require its employees to submit intelligence-related materials for pre-publication review,

petitioner contends (Pet. 7-9) that the district court imposed an unlawful "prior restraint" when it permanently enjoined him from "further breaching the terms and conditions of [his] Secrecy Agreement" (Pet. App. 16a). Petitioner does not suggest that the prospects of a future violation of the agreement are so remote as to make injunctive relief inappropriate. Rather, he maintains that, by enjoining him to abide by the terms of his contract, the district court has impermissibly infringed his First Amendment right to publish unclassified information without observing the restrictions to which he agreed in 1968.

This argument fails because its premise is faulty. As noted above, the First Amendment does not preclude the Agency from insisting that its prospective employees agree to the pre-publication review procedure. Requiring petitioner to comply with a valid contract he knowingly entered into also does not abridge his First Amendment rights.

Courts frequently grant specific performance in contract actions where money damages cannot adequately remedy a breach. See *Restatement of Contracts* §358 (1932). This is particularly so in the enforcement of "negative promises," *i.e.*, promises to refrain from certain conduct altogether or to refrain from such conduct unless some specified prior condition is met. 5A *Corbin on Contracts* §§1205-1209 (1964). Here, petitioner voluntarily agreed not to publish any manuscripts concerning intelligence activities without permitting the Agency to review them in advance to determine if they contained classified information. Under traditional equitable principles, the government is entitled to injunctive relief to

guard against petitioner's threatened future violations of this agreement.[4]

3. Finally, petitioner contends (Pet. 13-15) that the court of appeals erred in permitting the government to recover punitive damages if it could show that he falsely led the Agency to believe he would comply with his contractual obligations and that the Agency relied on his misrepresentations. Petitioner argues that the availability of damages in cases touching on the First Amendment must be carefully limited and that permitting a jury to award punitive damages in this case would be tantamount to giving jurors the power to punish the expression of unpopular ideas.

The first answer to this contention, of course, is that no punitive damages have yet been assessed against petitioner. If such damages are awarded after a jury trial

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[4]Petitioner asserts (Pet. 11-12) that the pre-publication review requirements of the 1968 secrecy agreement are no longer binding, because the agreement was impliedly repealed by the termination secrecy agreement he signed in 1976 when he left the Agency's employ (see note 1, *supra*). This question of contract interpretation turns on the particular agreements involved in this case and does not warrant the Court's attention. In any event, the argument was properly rejected by the courts below (Pet. App. 8a-9a, 24a-27a). Contrary to petitioner's contention, the 1976 agreement continues in effect the broad pre-publication review requirements of the 1968 agreement. The 1976 agreement (*id.* at 61a) prohibits the publication of "any classified information, or any information concerning intelligence or CIA that has not been made public by CIA, to any unauthorized person * * * without the express written consent of the Director of Central Intelligence or his representative." In *United States* v. *Marchetti*, *supra*, the court of appeals held that an agreement with similar language required that all writings concerning the Agency, not only writings that disclosed classified information, be submitted for pre-publication review. Any other interpretation would place the responsibility for protecting "intelligence sources and methods from unauthorized disclosure" in the hands of former Agency employees, rather than the Director of Central Intelligence.

on remand, petitioner may then seek review of the propriety of that relief. Until that time, however, review by this Court is not warranted. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 398 U.S. 327 (1967).

In any event, the court of appeals' endorsement of a punitive damages recovery on a proper factual showing was correct and will not give rise to the danger that petitioner imagines. The court of appeals found that the evidence introduced by the government was sufficient to permit a trier of fact to conclude that petitioner "willfully, deliberately, and surreptitiously" breached the 1968 secrecy agreement and that he did so in a manner specifically designed to mislead the Agency. Where a breach of contract involves conduct that is malicious, deceitful, taken in bad faith, or in reckless disregard for the rights of others, courts often permit the injured party to collect punitive damages in order to punish the wrongdoer and to deter such conduct in others. *Singleton* v. *Foreman*, 435 F. 2d 962 (5th Cir. 1970); *Material Handling Industries, Inc.* v. *Eaton Corp.*, 391 F. Supp. 977, 981 (E.D. Va. 1975); *Sims* v. *Western Steel Co.*, 403 F. Supp. 450, 454 (D. Utah 1975); *Southern National Bank of Houston* v. *Tri Financial Corp.*, 317 F. Supp. 1173 (S.D. Tex. 1970); *Mid South Cotton Growers Association* v. *Woods*, 380 F. Supp. 429, 431 (N.D. Miss. 1974); *Stamatiou* v. *United States Gypsum Co.*, 400 F. Supp. 431, 440 n.6 (N.D. Ill. 1975), aff'd, 534 F. 2d 330 (7th Cir. 1976); *Hoche Productions, S.A.* v. *Jayark Films Corp.*, 256 F. Supp. 291, 296 (S.D.N.Y. 1966).

The court of appeals in the present case concluded that effective enforcement of the Agency's secrecy agreement requires the availability of punitive damages, at least in situations where an employee deceitfully persuades the Agency not to take legal action to block the publication

of a manuscript that has not been submitted for review (see Pet. App. 36a-38a). This conclusion was a reasonable one, and the factual showing required as a precondition for recovery ensures that juries will not simply punish the expression of unpopular ideas.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1871

FRANK W. SNEPP, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Brief Amicus Curiae of THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS In Support of Petitioner

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B. Affidavits in New York Times Co. v. United States in support of prior restraint request

1. Leonard Neiderlehner, Deputy General Counsel, Department of Defense
2. Thomas M. Constant, Deputy Director of the Vietnam Task Force, International Security Affairs, Department of Defense

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I. INTRODUCTION

This is a most important case for the public, the press and present or former government employees who wish to inform the public and the press about the operation of their government.

Essentially, this case asks the question of whether, as a condition of government employment, the government may assert the most extreme sanction available to it to limit the First Amendment -- the sanction of prior restraints on publication, without any showing that any facts in the publication sought to be suppressed pose a clear and present danger to the national security of the United States.

The attempt of the government -- to suppress publications critical of it but containing no information damaging to it -- is the most ancient form of censorship and has as its historical basis the prior restraints imposed by the Colonial governors by licensing the press under the civil laws or by prosecuting the press under the Crown Sedition Acts.

It is the contention of the Amicus that the government is attempting in this case, through the rubric of a "fiduciary duty," to impose precisely the type of prior restraints on information about the government which the First Amendment was specifically designed to prohibit.

Furthermore, because this case involves a former government employee, it is the contention of the Amicus that the government is attempting to assert the repeatedly discredited theory of government ownership

of government information, or a theory of Crown (or in this case Government) Copyright which has been rejected by both the courts and the Congress.

It is the conclusion of this Amicus that if this so-called "contract" and the remedies sought to enforce it are upheld by this Court, this Court will have fashioned a civil "Official Secrets Act" doctrine which may be imposed by "contract" on any government employee and will result in the most severe censorship of government information.

II. STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to defending the First Amendment and Freedom of Information interests of the public to know about the operation of all forms of government, through its press.

The interest of The Reporters Committee in the constitutionality of orders restricting public information about the government is well known to this Court, the Committee having previously appeared before this Court challenging restrictions on the collection and publication of government information.

The Committee is primarily supported by press donations and relies heavily on volunteer efforts to conduct its activities--such as this brief.

The Reporters Committee for Freedom of the Press submits this brief amicus curiae

in support of the petition for writ of certiorari of the Petitioner Snepp with the consent of the Petitioner and Respondent, pursuant to Rule 42(1) of the Rules of the United States Supreme Court.

III. QUESTIONS PRESENTED

1. May the United States impose a prior restraint upon publications by a former employee without any evidence that a single fact in a previous publication has posed a clear and present danger to the national security of the United States?

2. May the government, consistent with the First Amendment, impose limitations on the fundamental rights of freedom of speech and of the press as a condition of public employment?

3. May the United States assert by contract a proprietary interest in government information -- enforceable by a prior restraint and damages -- in view of the Congressional prohibition against government information ownership contained in both the Government Copyright prohibition of the 1976 Copyright Act and in the First Amendment?

IV. STATEMENT OF THE CASE

Author Frank W. Snepp III obtained employment with the Central Intelligence Agency on September 16, 1968. (Joint Appendix, Vol. I, p. 108; hereinafter referred to as Jt. App.). Prior to the commencement of his employment, and as a condition of such employment, the author was required to sign a secrecy agreement with the Agency which he duly signed on September 16, 1968. (Jt. App., Vol. I, p. 108).

Paragraph 8 of the 1968 agreement provides:

> Inasmuch as employment by the Government is a privilege not a right, in consideration of my employment by CIA I undertake not to publish or participate in the publication of <u>any information or material relating to the Agency</u>, either during or after the term of my employment by the Agency. I understand that it is established Agency policy to refuse approval to publication of or participation in publication of any such information or material. (Emphasis supplied) (Jt. App., Vol. I, p. 16).

Mr. Snepp's employment with the Agency continued until January 23, 1976, the effective date of his resignation. During the period of his employment, Snepp served two tours of duty in South Vietnam, from June 2, 1969 to June 21, 1971 and from October 4, 1972 to April 29, 1975. (Jt. App., Vol. I, p. 108).

Upon resignation, Mr. Snepp signed another secrecy agreement which differed in its terms from the 1968 document. The 1976 agreement provided only that Snepp would not divulge "any classified information, or any information concerning intelligence or CIA that has not been made public by CIA" without the Agency's written consent. (Jt. App., Vol. I, p. 17).

In November, 1977, Random House, Inc. published a book written by Mr. Snepp, entitled Decent Interval, which related to the author's experiences and observations while in South Vietnam and was highly critical of the government's action. The manuscript of Decent Interval was not submitted to the CIA for approval prior to publication. (Jt. App., Vol. I, p. 125).

The government thereafter brought suit against Mr. Snepp in the U.S. District Court for the Eastern District of Virginia. The District Court interpreted the complaint to allege the author's "breach of his contractual and fiduciary duties caused by his failure to submit to the CIA for its initial review all manuscripts which contain information gained by him as a result of his CIA employment." (Jt. App., Vol. I, p. 122). The government further alleged in its complaint that "[a]s a result of defendant Snepp's breaches of his contractual and/or fiduciary duties, the United States has been damaged, inter alia, by the undermining of confidence and trust in the Agency, thereby hampering the ability of the Agency and of the Director of Central Intelligence to perform their respective statutory duties . . . ." (Jt. App., Vol. I, p. 11).

In its prayer for relief, the Government requested, inter alia, that "Snepp be

ordered to account for all gains, profits, royalties and other advantages derived by the defendant from the sale, serialization, republication rights, in any form, movie rights or other distribution for profit of the book entitled Decent Interval and that Snepp relinquish the proceeds accounted for to the Government. (Jt. App., Vol. I, p. 12).

During pretrial discovery, the Government stated that it did not contend, for the purposes of this litigation, that Decent Interval revealed any classified information or information concerning the intelligence activities of the CIA that had not previously been made public by the Agency. (Jt. App., Vol. I, p. 71).

At trial, the author asserted, among other defenses, that the First Amendment does not permit the enforcement of the prior restraint agreements in question. (Jt. App., Vol. I, p. 19, 122).

On July 7, 1978, following trial, the District Court found that Mr. Snepp deliberately breached his fiduciary and contractual obligations to the CIA; that he published Decent Interval for personal financial gain; and "that the publication of Mr. Snepp's book 'Decent Interval,' absent CIA pre-publication review has caused the United States irreparable harm and loss. It has impaired CIA's ability to gather and protect intelligence relating to the security of the United States of America." (Jt. App., Vol. I, p. 129). It was also determined that the author's First Amendment defenses lacked sufficient legal support. (Jt. App., Vol. 1, p. 129).

Judgment was entered in favor of the Government and the District Court imposed

on the author a constructive trust over, and an accounting of, any and "all revenues, gains, profits, royalties and other advantages derived from the sale, serialization, republication rights in any form, movie rights or other distribution for profit of the work Decent Interval." (Jt. App., Vol. I, p. 136-137).

The District Court further enjoined Mr. Snepp from publishing without prior CIA review "any manuscript which the defendant authors which concerns the Central Intelligence Agency, its activities or intelligence activities generally which the defendant gained during the course of or as a result of his employment with the agency." (Emphasis supplied; Jt. App., Vol. I, p. 134).

The United States Court of Appeals for the Fourth Circuit substantially affirmed the judgment of the District Court, accepting most of the government's contentions.

The Court did reverse that portion of the lower court order imposing a constructive trust over all the revenues from the book for the benefit of the U.S. government, and ordering an accounting of royalties and other republication rights. The Court suggested, however, that punitive damages may be available in the place of royalties. United States v. Snepp, 595 F.2d 926 (4th Cir. 1979).

It is from this judgment that Mr. Snepp appeals.

V. SUMMARY OF THE ARGUMENT

1. This is not a national security case because the government has declined to allege--and neither the District Court nor the Court of Appeals has made any finding--that a single sentence in the book has damaged the national security. Therefore Mr. Snepp's right to publish government information must be viewed in the same light as any other former government employee.

Even if this case has some national security overtones, the government has failed to allege or show that any information in the book poses a clear and present danger to the national security or even that any information is classified. It has relied on self-serving conclusions unsupported by any facts to justify its request for a prior restraint.

2. The rights protected by the First Amendment are fundamental rights of all citizens including public employees. This Court has specifically said that limitations on fundamental rights, especially the right to publicly criticize the conduct of government affairs, cannot be made conditions of public employment.

A. A limitation upon the right of free speech cannot be made a condition of public employment.

B. Any attempt, as in this case, to acquire such a waiver as a condition of employment is coercive, and therefore it is void and unenforceable.

3. The contractual basis of this case--for unjust enrichment and violation of fiduciary duty -- is in fact a cause of

action asserting a Government Copyright and is based upon a claim by the government of a proprietary interest in government information.

Therefore, the contract and the enforcement claim is specifically barred by the prohibition against Government Copyright in the 1976 Copyright Act and the First Amendment right of government employees -- recognized by the 1976 Act -- to publish information about the government.

4. The Circuit Court was in error in relying on its prior decision in United States v. Marchetti.

VI. ARGUMENT

1. THIS IS NOT A NATIONAL SECURITY CASE.

This is not a national security case for two separate reasons. First, the government has not alleged that information published (or to be published) has harmed or will harm the national security. Secondly, the allegations of any implied danger to the national security are too vague.

A. Though the government alleges that publication of Mr. Snepp's book has damaged the CIA's ability to collect intelligence, it has not alleged that any specific information previously published (or to be published) has caused or will cause any damage to the "national security" -- in fact, the words "national security" are not contained any place in the government's complaint.

Furthermore, while the government alleges that Mr. Snepp violated his duty "to protect intelligence sources and methods from

unauthorized disclosure," in fact there is no allegation in the complaint that he did not protect "intelligence sources and methods."

This is an employment contract action "arising from the breach of the terms and conditions of an agreement" between Mr. Snepp and the CIA. The total damage therefore claimed in this action arises from the breach of the contract itself and not from any information disclosed by Mr. Snepp.

Having chosen to litigate an employment contract the government has attempted to give it a "national security" gloss without any allegations that a single fact in the book has threatened the national security of the United States.

B. Even assuming that this case has some "national security" overtones, they are too vague and unspecific for this court to take judicial notice of, certainly not as a justification for a prior restraint.

The government declined to allege that any information in Mr. Snepp's book is classified. It has conceded that not a single sentence in the book poses a danger to the national security and that no paragraphs or specific sections of the book constitute a "clear and present danger" to the national security of the United States. It is the government's contention that the mere refusal to submit to a prior restraint in and of itself--i.e., he has "flaunted the basic system of control"--constitutes a grave and irreparable injury sufficient to warrant a restraint on future publications. The only evidence submitted by the government to support its claim of harm to the national security are the vague and self-serving conclusions of the Director of the Central Intelligence Agency that

confidential sources have dried up as a result of the book's publication, and that other potential sources had never "germinated." (Jt. App., Vol. II, p. 133).

This is the only witness for the government upon which it relies to sustain the extreme sanction of a prior restraint. It is these bare conclusions -- unsupported by any facts -- upon which the government relies to prove the "direct, immediate, and irreparable damage to our Nation or its people" in seeking to restrain Mr. Snepp's freedoms of speech and press. New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

It is respectfully submitted that this is precisely that type of national security "surmise or conjecture that untoward consequences may result" upon which a prior restraint may never be predicated. Id. at 725-26 (Brennan, J., concurring). "In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary." Id. at 727 (Brennan, J., concurring).

Not only is there no factual basis to indicate that the potential loss of some unidentified intelligence sources fulfills that strict standard, but there is no evidence that Mr. Snepp's publication was the proximate cause of any such loss.

It is clear that the government has failed to meet any burden to support any restrictions on Mr. Snepp's First Amendment rights. This is true whether this Court accepts the standard urged by The New York

Times and The Washington Post that "publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport at sea" or other similar disaster (Id. at 726-27, Brennan, J., concurring); or alternatively, accepts the test urged by the government in The New York Times case that it need only prove "grave and immediate" harm to the national security. Brief of the United States to this Court, New York Times Co. v. United States, 403 U.S. 713 (1971), p. 12.

In fact, the government is attempting to do in this case precisely what it unsuccessfully attempted to do in the Times case: support its prior restraint request on bare allegations and conclusions of danger to the national security. The government's affidavits show the similarity quite clearly.

The government affidavits in the New York Times case were given by Leonard Niederlehner, Deputy General Counsel of the Department of Defense, and Thomas M. Constant, Deputy Director of the Vietnam Task Force, Office of the Assistant Secretary of Defense, International Security Affairs, Department of Defense. Both made the identical verbatim statement:

> Publication of the said excerpts has prejudiced the defense interests of the United States and publication of additional excerpts from the aforesaid study would further prejudice the defense interests of the United States and result in irreparable injury to the national security. (App. C-1, C-2).

In the case now before the Court, the United States alleges even less damage -- that there has been an "undermining of confidence and trust in the Agency, thereby hampering the ability of the Agency and of the Director to perform their . . . duties." (Jt. App., Vol. I, p. 11).

Because the government has failed to produce any evidence that Mr. Snepp's conduct caused any identifiable injury to or even remotely threatens the national security, Mr. Snepp must be accorded the same status as any other public employee with respect to his right to speak about the government. To hold otherwise without any proof of a clear and present danger to the national security would allow any government agency to impose the type of prior restraint that the government is attempting to enforce against Mr. Snepp. This would clearly result in the destruction of "[t]he dominant purpose of the First Amendment [which] was to prohibit the widespread practice of governmental suppression of embarrassing information." New York Times Co. v. United States, supra, at 723-24 (Douglas, J., concurring).

2. THE RIGHTS PROTECTED BY THE FIRST AMENDMENT ARE FUNDAMENTAL RIGHTS OF ALL CITIZENS, INCLUDING PUBLIC EMPLOYEES. THIS COURT HAS SAID THAT LIMITATIONS ON FUNDAMENTAL RIGHTS, ESPECIALLY THE RIGHT TO PUBLICLY CRITICIZE THE GOVERNMENT, CANNOT BE MADE CONDITIONS OF PUBLIC EMPLOYMENT. THEREFORE, ANY ASSERTED WAIVER OF THESE FIRST AMENDMENT RIGHTS IS VOID AND UNENFORCEABLE.

A. The government may not require, as a condition of public employment, that a

public employee waive his fundamental constitutional rights. This is especially true with respect to his First Amendment right of free speech which includes at its core the right to report on and publicly criticize the operation of the government itself. Time after time, this Court has ruled against the impositions of such conditions. Most recently, in Elrod v. Burns, 427 U.S. 347 (1976), a case involving a challenge to the political patronage system of non-civil service public jobs, in response to the government's argument that public employment is a privilege, not a right, this Court declared:

> That is the notion that because there is no right to a government benefit, such as public employment, the benefit may be denied for any reason. Perry, however, emphasized that "[f]or at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." (Citation omitted). Perry and Keyishian properly recognize one such impermissible reason: The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly. "'[T]he theory that public employment which may be denied altogether may be subject to any conditions, regardless of how unreasonable, has been uniformly rejected.'" (Citation omitted.) "It is too late in the day to doubt that the liberties of religion

> and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." (Citation omitted.) (Emphasis supplied.) Id. at 360-61.

The examination of the public employment cases that follows illustrates the uniformity with which this Court has applied the above principle with respect to the conditioning of public employment upon infringements of First Amendment rights.

In Shelton v. Tucker, 364 U.S. 479 (1960), this Court invalidated an Arkansas statute that required public school teachers to file affidavits annually that disclosed every organization to which they belonged or regularly contributed during the previous five years. Although recognizing that the state had a substantial interest in inquiring into the teacher's fitness and competence, this Court stated that "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Id. at 488.

In Torcaso v. Watkins, 367 U.S. 488 (1961), a Maryland state constitutional provision which required a declaration of a belief in God as a prerequisite to public office was invalidated on the ground that it violated the First Amendment's freedom of belief and religion clauses.

An oath that was required as a condition of employment as a teacher in the State of Washington was invalidated on the grounds of vagueness in Baggett v. Bullitt, 377 U.S. 360 (1965), Mr. Justice White speaking for the majority outlined the protected activities improperly proscribed by the oath:

> It would not be unreasonable for the serious-minded oath-taker to conclude that he should dispense with lectures voicing far-reaching criticism of any old or new policy followed by the Government of the United States. He could find it questionable under this language to ally himself with any interest group dedicated to opposing any current public policy or law of the Federal Government, for if he did, he might well be accused of placing loyalty to the group above allegiance to the United States. (Emphasis supplied.) Id. at 371-72.

The publication of Mr. Snepp's book is precisely within the bounds that Justice White used to illustrate the type of activities that cannot be proscribed: criticism of governmental policies and the manner in which those policies are executed.

In Keyishian v. Board of Regents, 385 U.S. 589 (1967), this Court once again examined an oath requirement imposed upon teachers by the statutes and administrative regulations of the State of New York as a condition of their employment. In responding to the now familiar right-privilege defense, this Court declared:

> But constitutional doctrine which has emerged since that decision [Referring to Adler v. Board of Education, 342 U.S. 485 (1952)] has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. Id. at 605.

That case resulted again in a finding that the condition impermissibly violated the employees' First Amendment rights.

An even stronger decision in support of Mr. Snepp's position can be found in Pickering v. Board of Education, 391 U.S. 563 (1968). Pickering exercised his right of free speech precisely as Mr. Snepp has done; he publicly criticized a policy of his employer based upon information available to him in the course of his employment. This Court clearly defined government employees' rights:

> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. Id. at 568.

This Court did imply that in certain instances the exercise of free speech by the employee could interfere with the employee's relationship with his immediate supervisor and that his employment could possibly be terminated. But there is no indication that damages or prior restraints would be proper remedies. These exceptions would not result in court-imposed punishment for the statement, as has been done here, but rather would result only in a termination of the relationship. This is quite obviously inapplicable to the instant

case because Mr. Snepp, recognizing this, had previously and voluntarily terminated his employment with the CIA to write this book in the public interest.

In addition, this Court in Pickering also recognized that, in many instances, it is the insider -- the public employee with first-hand knowledge -- who is often in the best position to counter the official version of the issues at hand. This Court declared: "Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." Id. at 572.

In companion cases, Gardner v. Broderick, 392 U.S. 273 (1968), and Uniformed Sanitation Men Assn. v. Comm. of Sanitation, 392 U.S. 280 (1968), this Court reviewed the dismissals of municipal employees pursuant to a provision in the New York City Charter. It provided for dismissal from their positions if an employee was summoned to appear before any investigatory body and refused to answer questions related to his/her employment or waive immunity from prosecution. In Gardner, the police officer involved was summoned before a grand jury investigating bribery and corruption of police officers. He refused to sign the waiver and was dismissed for that refusal. A similar situation was also involved in Uniformed Sanitation Men Assn.

In both cases, this Court found the provision of the City Charter unconstitutional because it required the public employees to choose between their jobs and the exercise of one of their constitutional rights. This Court again reiterated the now familiar principle: "Petitioners as

public employees are entitled, like all other persons, to the benefits of the Constitution, including the privilege against self-incrimination." Uniformed Sanitation Men Assn., 392 U.S. at 284-85.

Although Cole v. Richardson, 405 U.S. 676 (1972), resulted in a finding that the loyalty oath required of Massachusetts state employees was valid, that decision again affirmed the principles previously applied with regard to the placing of unconstitutional conditions upon public employment: "Nor may employment be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities such as the following: criticizing institutions of government . . . ." (Emphasis supplied.) Id. at 680.

Call the document that Mr. Snepp was forced to sign a "secrecy agreement," a "contract," or an "oath," it is essentially the type of document which this Court once again clearly indicates is invalid on its face.

In summary, then, the government may not require, as a condition of public employment, that the employee relinquish his fundamental constitutional right of free speech. In fact, as this Court pointed out in Pickering, because of his unique vantage point, the public employee is essential to the full and robust discussion of public issues that the First Amendment is intended to insure in a democracy.

B. There was no waiver of rights. The government should not be heard to say that Mr. Snepp voluntarily waived his right of free speech.

In Keyishian, supra, the employees had been required to sign a certificate stating that they had not been members of the Communist Party, inter alia. Later, when the procedure came under attack, the procedure was changed from requiring the employees to actually sign the certificates to simply notifying them of the anti-communist prohibitions contained in the statutes and regulations. The employees were also notified that the requirements were to be considered part of their employment contracts. This change of procedure, deleting the signed "waiver" requirement, did not affect the judgment of this Court: "The substance of the statutory and regulatory complex remains, and from the outset appellant's basic claim has been, that they are aggrieved by its application." 385 U.S. at 596.

It is clear, therefore, that whether there is a signed waiver or whether another procedure is used, the focus of judicial scrutiny should be whether the goal of the procedure is to restrict the exercise of a fundamental right.

Also, in Garrity v. New Jersey, 385 U.S. 493 (1967), a waiver of a policeman's Fifth Amendment right against self-incrimination was obtained by informing him that if he refused to agree to the waiver, his employment would be terminated. This Court found the waiver invalid because the threat of loss of employment was coercive and, therefore, the waiver was not voluntary. This Court declared: "There are rights of constitutional stature whose exercise a state may not condition by the exaction of a price. . . . Assertion of a First Amendment right is still another. (Citation omitted.)" Id. at 500.

Perhaps an even stronger example that First Amendment rights cannot be waived can be found in the case of Elrod v. Burns, 427 U.S. 347 (1967). In Elrod, employees about to be discharged because of their political party affiliation claimed a violation of their First Amendment right of association, even though they had received their public positions several years earlier through the exercise of the same political patronage procedure they now were challenging.

Mr. Justice Powell noted in his dissent that they apparently accepted patronage jobs knowingly and willingly, while fully familiar with the ". . . 'tenure' practices long prevailing . . . ." Id. at 380. In spite of this awareness, purporting to amount to a knowing waiver of their right to challenge the constitutionality of the practice, this Court held that the First Amendment was violated because it resulted in conditioning public employment upon a restriction of the employees' right of association.

In conclusion, not only is it beyond the constitutional authority of government to require a waiver of fundamental rights as a condition of public employment, but if such a waiver is obtained, it is void and unenforceable.

3. THE CONTRACT IN THIS CASE -- AND THE CAUSE OF ACTION TO ENFORCE IT -- ARE IN REALITY EFFORTS BY THE GOVERNMENT TO ASSERT A GOVERNMENT COPYRIGHT ON MR. SNEPP'S WORKS BY ALLEGING GOVERNMENT OWNERSHIP OR PROPRIETARY INTEREST IN GOVERNMENT INFORMATION.

AMICUS AND THE CHIEF LEGISLATIVE ARCHITECT OF THE 1976 COPYRIGHT ACT

BELIEVE THAT BOTH THE CONTRACT AND THE ENFORCEMENT EFFORT ARE BARRED BY THE 1976 ACT WHICH PROHIBITS GOVERNMENT COPYRIGHT ACTIONS AND BY THE FIRST AMENDMENT.

The cause of action in this case -- for injunctive relief and royalties -- is essentially an action in copyright masquerading under the name of a "fiduciary relationship;" and Congress has prohibited the federal government from restraining a publication based on any concept of government proprietary interest, common law or statutory copyright.

Because there is no proof sufficient to support a finding that Mr. Snepp's book threatens the national security, the government has conceded that it must rely on its alleged contract right to support the prior restraint on publication.

While the cause of action asserted by the government alleges violation of "fiduciary duties," (Jt. App., Vol. I, p. 11, para. 22) and unjust enrichment, (Id. at para. 21) in reality what the government has alleged and is seeking under an equity claim is the precise equivalent of a common law or statutory copyright interest.

In fact, unjust enrichment and conversion in violation of the fiduciary relationship are the common law grounds which were the foundations for common law and later statutory copyright protection.

The underlying assumption of common law and statutory copyright is that one party, in this case the United States government, may assert a proprietary interest

in the information sought to be restrained. The contract itself is based on the governmental assertion of a proprietary interest in classified information.

Evidence that this is an attempt by the United States government to avoid the prohibitions against Government Copyright are the remedies sought, which are damages based on "all gains, profits, royalties and other advantages derived by the defendant from the sale, serialization, republication rights, in any form, movie rights or other distribution for profit of the work entitled Decent Interval." (Jt. App., Vol. I, p. 12).

These are precisely the remedies that are available to plaintiffs in copyright actions. 17 U.S.C. §502(a), §504(b) (1976).

Therefore, it seems clear that this cause of action alleged by the government, the relief sought by the government and the relief granted below are based on the theory that the government may assert a proprietary interest in the information obtained by an employee during the course of his employment, and that this proprietary interest is sufficient to uphold a cause of action in copyright -- a cause of action specifically denied to the United States by the Congress in both the 1909 and 1976 Copyright Acts.

Further evidence of this attempt to illegally assert a Government Copyright claim is given by the Hon. Robert Kastenmeier, the chief legislative architect of the 1976 Act, in a letter to this Amicus. (See App. A).

Rep. Kastenmeier states: "I would suggest that this complaint is in fact a cause of action to enforce a Government Copyright on the publication of government information, a cause of action which is clearly prohibited by the 1976 Copyright Act." (App. A).

The 1909 Copyright Act states: "No copyright shall subsist in . . . any publication of the United States government." 17 U.S.C. §8 (1970).

This hostility to the assertion of a proprietary interest in government information and reports was expanded in the 1976 Copyright Act which says: "Copyright protection under this title is not available for any work of the United States Government . . . ." 17 U.S.C. §105 (1976).

The legislative history of the Act makes clear Congress' view on the matter. It states that under the Act "a government official or employee would not be prevented from securing copyright in a work written at that person's own volition and outside his or her duties, even though the subject matter involved the government work or professional field of the official or employee." (H.R. Rep. No. 1476, 94th Cong., 2d Sess., p. 58, reprinted in [1976] U.S. Code Cong. & Ad. News 5659, 5671.

The legislative history further states that "the effect of" the prohibition against Government Copyright "is intended to place all works of the United States Government published or unpublished in the public domain . . . . [I]t also means that as far as the copyright law is concerned, the government could not restrain the employee

or official from disseminating the work if he or she chooses to do so. The use of the term 'work of the United States government' does not mean that a work falling within the definition of that term is the property of the U.S. government." (Emphasis supplied.) Id. at 59.

Rep. Kastenmeier states:

> "The Congress, when it considered the Act, carefully studied the question of whether the government should be permitted to assert any proprietary interest in its own information; and to enforce this proprietary interest through Government Copyright by having injunctive relief and an accounting of royalties and other equitable remedies -- precisely the relief requested in this case.
>
> The conclusion of the Congress, as expressed in the Act and in the voluminous legislative history, was that the principles of the First Amendment and the 1909 Copyright Act give to the people of this country the right to have information about their government; and that therefore, government employees have the right to publish information obtained during the course of government employment free from any prior restraints or post-publication equitable relief based on any theory of government ownership.
>
> The Act makes clear that Congress was not merely neutral in this debate but with great specificity prohibited the United States from

> asserting or enforcing any proprietary interest in government information." (App. A).

The reasons for the long-term Congressional opposition to government assertions of a proprietary interest in its own information is grounded in First Amendment considerations. In Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960), vacated on other grounds, 369 U.S. 111 (1962), the U.S. Court of Appeals for the District of Columbia discussed the purpose of the predecessor statute to the current Section 105 and stated: "It is designed to achieve in a democracy that depends upon accurate public knowledge the broadest publicity for matters of government." Id. at 268. It is apparent that the inclusion of this section in the copyright law was an attempt by Congress, consistent with the premise of the First Amendment, to prohibit any assertion by the government of a proprietary interest in any information in its possession because Congress feared that it could be used to restrict the free flow of information that is vital to keep the public informed about the operation of its government.

To permit the government to assert a proprietary interest and Government Copyright remedies against government employees writing about their government is precisely the type of self-serving censorship which the Copyright Act and the First Amendment were designed to prohibit. Quite obviously, as the evidence in Mr. Snepp's trial has shown, the CIA gives publication permission to present and former employees whose writings show the CIA in a favorable light. Certainly the CIA cannot be trusted to, at

its discretion, approve publications which cast the CIA in a highly unfavorable light or perhaps even, as recent history has shown us, demonstrate that officials of the CIA are violating the Constitution and laws of the United States.

Suppose, for example, Mr. Snepp knows something about the CIA involvement in Watergate. Can this Court leave to the discretion of the CIA the decision as to whether the public is to be told of this information?

The concept that the government, at its discretion, may penalize its own critics regardless of the source of their information, is a concept that was laid to rest in 1803 with the expiration of the Alien and Sedition Act. See generally, New York Times v. Sullivan, 376 U.S. 254 (1964). The entire development of the First Amendment and the inter-related development of Congressional encouragement for government employees to write about government in the Copyright Acts would be completely voided by the enforcement of this contract which gives to the United States Government in the civil courts the same discretionary censorship powers which the Alien and Sedition Acts granted to the government in the criminal courts. In fact, this Court has said that an unconstitutional criminal statute, penalizing publication under the First Amendment, e.g., Roth v. U.S., 354 U.S. 476 (1957), is as much a prior restraint as an unconstitutional civil statute such as the one attempted to be used in Near v. Minnesota, 283 U.S. 697 (1931).

Therefore, it is the contention of the Amicus that this Court has several alternatives open to it. It could order this

action dismissed on the grounds it is a clear violation of the First Amendment and Congress' intent to further public information about government through the Copyright Act; or it could never reach the First Amendment question and merely hold that the Government is attempting to do indirectly -- under the rubric of a violation of a fiduciary duty -- what Congress has consistently and specifically prohibited the government from doing in both the 1909 and 1976 Copyright Acts.

If Congress has prohibited the government from asserting a proprietary interest in its own information by statute, the CIA lacked the authority to impose as a condition of government employment a requirement which the Congress has told the CIA it may not impose.

Or, as Rep. Kastenmeier states:

It may be fairly concluded that the United States, through the Central Intelligence Agency, imposed a "contract" prohibited by law; is seeking a cause of action and remedies prohibited by law; and has obtained a ruling from the United States District Court which the Court has been told by the Congress it is without authority to issue.

Furthermore, the "contract" cause of action advanced by the government and lower court decision - if upheld - may threaten the Congressional prohibition against Government Copyright; and that any agency in the government will then be free to require their employees to sign such a "contract,"

negating the right given to him by the Congress to publish government information based on government employment.

It is my view this effort by the United States - to suppress criticism of itself - is precisely the type of information specifically protected by the 1976 Act and the First Amendment; and the decision of the District Court is false to the langauge of the 1976 Act, false to its intent and false to its goals. (App. A)

Background note on the government's previously unsuccessful efforts to assert a proprietary interest in government information.

Since 1971, the federal government has made a series of unsuccessful efforts in Congress seeking both criminal and civil sanctions for the unauthorized use of government information based on the argument -- now being made in this case -- that the government has an enforceable proprietary interest in its own information.

Congress specifically rejected the claim twice in the criminal law -- first, in S. 1400, introduced by the Nixon Administration, and again in S. 1, supported by the Ford Administration. In the civil law, Congress rejected the government's claim of a proprietary interest by inserting a government copyright prohibition in the 1976 Copyright Act.

In order to understand the bad faith being exercised by the Department of Justice

in this case, it would be helpful for this Court to go back to the 1971 dispute over the Pentagon Papers.

In 1971, the Justice Department indicted Anthony Russo and Daniel Ellsberg on charges of conspiring to receive, and conversion of, government property -- "studies, reports, memoranda and communications, which were things of value to the United States of a value in excess of $100." In addition, that indictment accused the defendants of an equally novel crime -- "to defraud the United States . . . by impairing, obstructing and defeating its lawful government function of controlling the dissemination of . . . government studies, reports, memoranda and communications." United States v. Russo, Crim. No. 9373 (D.C. Cal. 1971); Indictment at p. 2, filed December 29, 1971.

The government's trial brief in the Ellsberg case said succinctly, "both the documents and contents are the property of the United States and remain its property . . . until they are released by the government. The content of . . . such . . . documents is itself government property quite apart from the government's ownership of the sheets of paper on which it is recorded." Id., Brief for Prosecution at p. 29, 33.

The Ellsberg case was dismissed for other reasons and so the government in the original S. 1400 added a new definition of government information. It did this by defining government property as "intellectual property or information by whatever means preserved." S. 1400, Sec. 111, 93rd Cong., 1st Sess. (1973).

The press, including this Amicus, appeared before the Senate Judiciary Subcommittee holding hearings on the bill and protested. We said that by including intellectual property as property of the United States, the Justice Department was clearly attempting to lay the foundation to prosecute both the news media and government employees in order to get around the problems it faced in the Ellsberg prosecution. (Statement of The Reporters Committee for Freedom of the Press before the U.S. Senate Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, May 2, 1973.)

When S. 1 was reintroduced, the Justice Department again made an effort to assert a proprietary interest in government information, enforced by the criminal laws, by supporting a provision which stated that a member of the press or a government employee would be accused of "theft" if in any way he "uses" ... records or other documents owned by, or under the care, custody or control of "the United States ... regardless of its monetary value." S. 1, Sec. 1731, 94th Cong., 1st Sess. (1975).

Again, this Amicus appeared before the Senate subcommittee and protested that the government was trying to revive the unconstitutional theory asserted in the original S. 1400 of a proprietary interest in government information. (Statement of The Reporters Committee for Freedom of the Press before the U.S. Senate Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, April 17, 1975.)

As justification for its legal efforts to assert an enforceable proprietary interest in government information, the

Justice Department in the past has relied on Haas v. Henkel, 216 U.S. 462 (1910), a case in which three cotton speculators were accused of bribing a Department of Agriculture employee in order to arrange for false cotton future information to be given out in such a way as to defraud the public.

The case against Mr. Snepp has no implications of fraud. And furthermore, Haas v. Henkel, supra, was severely restricted in the unanimous opinion by Chief Justice Taft in Hammerschmidt v. United States, 265 U.S. 182 (1924). The Chief Justice said that fraud against the government could be used to prosecute non-government employees who use false government reports in a conspiracy involving trickery, bribery of an official, deceit and false pretenses. Id.

In short, Haas v. Henkel, supra, Dennis v. United States, 384 U.S. 855 (1966), United States v. Lambert, 446 F. Supp. 890 (D.C. Conn. 1978) and other cases in this field recognize a proprietary interest in honest and impartial government administration in the delivery of goods and services.

In fact, that is precisely what Mr. Snepp is attempting to do -- to deliver to the people their own information about the operation of their government, in this case the Central Intelligence Agency.

After two unsuccessful efforts in Congress to enforce this non-existent proprietary interest in government information, the government made one last attempt through the civil laws in the proposed revision of the 1909 Copyright Act.

Again, the government was rebuffed by the Congress in the 1976 Act. So now we find that under the transparent rubric of "violating fiduciary duties," the Justice Department is once again attempting to resurrect the rejected doctrine that the government has an ownership interest in its own information. In fact, the whole common law doctrine of "unjust enrichment" and violation of "fiduciary duties" rests on the assumption of misuse of property owned by another. The alleged owner who is bringing this action is the United States Government. Its ownership claim has been repeatedly made in the past and it has been repeatedly rejected by the Congress.

4. THE CIRCUIT COURT WAS IN ERROR IN RELYING ON ITS PRIOR DECISION IN UNITED STATES v. MARCHETTI.

Even in United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), cert. denied, 409 U.S. 1063 (1972), the Fourth Circuit held, in part, that the government could not restrain unclassified information. Id. at 1317. Amicus believes this Court should reverse the Circuit Court because there has been no allegation or proof that there is classified information in Mr. Snepp's book.

To the extent that the Circuit Court held in Marchetti, and in the instant case, that the government could restrain classified information not posing a clear and present danger to the national security, Amicus believes the Circuit Court was in error.

However, neither Marchetti nor this case addressed the Government Copyright argument although both cases were clearly

based on a claim by the government that it owns government information. This Court could therefore decide this case on the Government Copyright prohibition issue, avoiding any ruling on the First Amendment prior restraint issue.

VII. CONCLUSION

For all the foregoing reasons, amicus respectfully asks this Court to grant the petition for certiorari to review this important case and, upon such grant, to reverse the judgment of the Court of Appeals.

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June 25, 1979

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October 25, 1978

Jack C. Landau, Esq.
Director
The Reporters Committee for
Freedom of the Press
1750 Pennsylvania Ave. N.W.
Washington, D.C. 20006

Dear Mr. Landau:

I would be pleased if you would bring my views on the case of United States v. Snepp to the attention of the U.S. Court of Appeals, because I believe that the provisions of the 1976 Copyright Act should be dispositive of this case.

1. As you may know, I am Chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary. I was a co-sponsor of this bill on the floor of the House; attended and then chaired the more than ten years of hearings on the bill; was Chairman of the House-Senate Conference Committee on the bill finally passed by the Congress and signed into law by the President.

2. It is my understanding that complaint filed by the United States asserts that Mr.

Snepp violated a "contract" imposing on him "fiduciary duties" to give the United States pre-publication approval rights, as a condition of his employment, on any information he might seek to publish based on his government employment.

I further understand that the remedies sought in the complaint - an injunction against future publication without approval from the United States and an accounting to the United States of all "gains, profits, royalties, and other advantages derived by the" author from the "sale, serialization, republication rights in any form, movie rights, or other distribution for profit of his work."

3. I would suggest that this complaint is in fact a cause of action to enforce a Government Copyright on the publication of government information, a cause of action which is clearly prohibited by the 1976 Copyright Act.

4. The Congress, when it considered the Act, carefully studied the question of whether the government should be permitted to assert any proprietary interest in its own information; and to enforce this proprietary interest through Government Copyright by having injunctive relief and an accounting of royalties and other equitable remedies - precisely the relief requested in this case.

5. The conclusion of the Congress, as expressed in the Act and in the voluminous legislative history, was that the principles of the First Amendment and the 1909 Copyright Act give to the people of this country the right to have information about their government; and that therefore, government employees have the right to publish information obtained

during the course of government employment free from any prior restraints or post-publication equitable relief based on any theory of government ownership.

The Act makes clear that Congress was not merely neutral in this debate but with great specificity prohibited the United States from asserting or enforcing any proprietary interest in government information.

6. It may be fairly concluded that the United States, through the Central Intelligence Agency, imposed a "contract" prohibited by law; is seeking a cause of action and remedies prohibited by law; and has obtained a ruling from the United States District Court which the Court has been told by the Congress it is without authority to issue.

7. Furthermore, the "contract" cause of action advanced by the government and lower court decision - if upheld - may threaten the Congressional prohibition against Government Copyright; and that any agency in the government will then be free to require their employees to sign such a "contract," negating the right given to him by the Congress to publish government information based on government employment.

In my view this effort by the United States - to suppress criticism of itself - is precisely the type of information specifically protected by the 1976 Act and the First Amendment; and the decision of the District Court

is false to the language of the 1976 Act,
false to its intent and false to its goals.

Sincerely,

/s/

Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:blv

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff	)	
v.	)	AFFIDAVIT
THE WASHINGTON POST COMPANY, et al., Defendants	)	

THOMAS M. CONSTANT, being duly sworn, deposes and says:

1. I am the Deputy Director of the Vietnam Task Force, Office of the Assistant Secretary of Defense, International Security Affairs, Department of Defense.

2. I have reviewed the 47-volume study entitled: "History of U.S. Decision-Making Process on Vietnam Policy," and also known as "United States-Vietnam Relations," covering the period 1945-1967, which was prepared in 1967-1968 at the direction of then Secretary of Defense Robert McNamara, is currently classified "Top Secret-Sensitive," pursuant to the provisions of Executive Order 10501 and the contents thereof relate to the national defense of the United States. The article appearing in the Washington Post's edition of June 18, 1971, under the caption "Documents Reveal United States Effort in '54 to Delay Viet Election," contains excerpts from material contained in the 47-volume study and from the source

material from which the study was drawn. This source material is variously classified "Top Secret" and "Secret" pursuant to the aforesaid Executive Order. Publication of the said excerpts has prejudiced the defense interests of the United States and publication of additional excerpts from the aforesaid study would further prejudice the defense interests of the United States and result in irreparable injury to the national defense.

3. Deponent further says that the Washington Post was not authorized by the United States Government or any authorized officer thereof to have possession of the aforesaid 47-volume study, the internal documents from which it was drawn, or to publish the contents of the same.

_____
THOMAS M. CONSTANT
Deputy Director of the
Vietnam Task Force
Office of the Assistant
Secretary of Defense
International Security
Affairs
Department of Defense

Subscribed and sworn to
before me this ____ day of
_____, 1971.

_____
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff	)	
v.	)	AFFIDAVIT
THE WASHINGTON POST COMPANY, et al., Defendants	)	

LEONARD NIEDERLEHNER, being duly sworn, states that the following is true, according to his information and belief:

1. I am the Deputy General Counsel of the Department of Defense.

2. The 47-volume study entitled: "History of U.S. Decision-Making Process on Vietnam Policy," and also known as "United States-Vietnam Relations," covering the period 1945-1967, which was prepared in 1967-1968 at the direction of then Secretary of Defense Robert McNamara, is currently classified "Top Secret-Sensitive," pursuant to the provisions of Executive Order 10501 and the contents thereof relate to the national defense of the United States. The article appearing in the Washington Post's edition of June 18, 1971, under the caption "Documents Reveal United States Effort in '54 to Delay Viet Election," contains excerpts from material contained in the 47-volume study and from the source material

from which the study was drawn. This source material is variously classified "Top Secret" and "Secret" pursuant to the aforesaid Executive Order. Publication of the said excerpts has prejudiced the defense interests of the United States and publication of additional excerpts from the aforesaid study would further prejudice the defense interests of the United States and result in irreparable injury to the national defense.

3. Deponent further says that the Washington Post was not authorized by the United States Government or any authorized officer thereof to have possession of the aforesaid 47-volume study, the internal documents from which it was drawn, or to publish the contents of the same.

_____
LEONARD NIEDERLEHNER
Deputy General Counsel
Department of Defense

City of Washington)
) ss
District of Columbia)

Before me personally appeared Leonard Niederlehner, Deputy General Counsel, Department of Defense, who being first duly sworn deposes and says that he has read the foregoing affidavit and the facts stated and allegations contained therein are true as he verily believes.

Subscribed and sworn to
before me this _____ day of
_____, 1971.

_____
Notary Public

Supreme Court, U. S.
FILED
JUL 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1871

UNITED STATES OF AMERICA,

Plaintiff,

against

FRANK W. SNEPP, III,

Defendant.

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., P.E.N. AMERICAN CENTER, RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, THE ATLANTIC MONTHLY COMPANY, NEW OREGON PUBLISHERS, INC. D/B/A OREGON MAGAZINE AND RANDOM HOUSE, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1871

UNITED STATES OF AMERICA,

Plaintiff,

against

FRANK W. SNEPP, III,

Defendant.

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., ET AL., AS *AMICI CURIAE,* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This brief, *amici curiae,* is submitted in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.[1] Letters from the parties, consenting to the submission of this brief, have been filed with the Clerk.

---

1. The opinion of the Court of Appeals is reported at 595 F.2d 926.

Interests of the *Amici*

The organizations and firms participating in this brief as *amici curiae* represent many of the nation's leading publishers, authors, journalists and broadcasters. This diverse group has in common a dedication to the robust and unfettered freedoms of speech and of the press guaranteed by the First Amendment to the United States Constitution.

In *amici's* view, the decision of the Fourth Circuit in this case, expanding upon several earlier decisions of that Court,[2] strikes at the very heart of these preeminent First Amendment guarantees. In validating and rigorously enforcing secrecy agreements of the type entered into by Frank Snepp, the Fourth Circuit has sanctioned unprecedented restrictions on the First Amendment rights of government employees.

But the impact of the Fourth Circuit's ruling does not stop there. For these restrictions will surely impact as well on the free flow of information to the public concerning the operations of government.

Amici and their members, who gather and publish information concerning the workings of government, and the public as recipient of this information, are affected as surely as if they had been parties to the suit below. For example, several *amici* who—although not parties to secrecy agreements—wish to publish the writings of former government employees or officials, now find these works subject to the stultifying regimen of prior review and prior censorship sanctioned by the Fourth Circuit.[3]

2. *United States* v. *Marchetti,* 466 F.2d 1309 (4th Cir.), *cert. denied,* 409 U.S. 1063 (1972); *Alfred A. Knopf, Inc.* v. *Colby,* 509 F.2d 1362 (4th Cir.), *cert. denied,* 421 U.S. 992 (1975).

Also deeply troubling to *amici* is the possibility that *amici* or their members—although not "contractually" bound to submit to government censorship—could nonetheless, under the rationale and ruling of the court below, not only be "chilled" in their operations but also arguably be subjected to penalty for publishing, broadcasting or reporting upon government operations in alleged violation of the secrecy agreements.[4]

Finally, all of the *amici* and their members find in the Fourth Circuit's rulings the seeds of a state secrecy system—extending far beyond the internal confidences of the bureaucracy—at war with the constitutional preference for open government and the free discussion of government affairs.

3. A discussion of the direct impact of the present suit upon *amici* Atlantic Monthly Company, New Oregon Publishers, Inc. d/b/a Oregon Magazine and Random House, Inc. is found *infra* at 11-12, 12 n.10 and 17 n.12.

4. As is more fully discussed in Point II(C) below, the sweeping language of the injunction approved by the court below would by its terms seemingly apply to any third party who knowingly receives such information in violation of the pre-submission requirement. Thus, the District Court's Order permanently enjoins not only Frank Snepp, but also his "agents . . . and those persons in active concert or participation with him . . . from further breaching . . . [his] Secrecy Agreement . . . by failing to submit any manuscript or other writing containing information which relates to the Central Intelligence Agency . . . for Agency review prior to publication." (Order of August 2, 1978)

Statement of the Case

This case represents the culmination of a series of cases decided by the Fourth Circuit, thus far unreviewed by this Court, in which the First Amendment was deemed subordinate to an employment agreement.

In *United States* v. *Marchetti, supra,* the Fourth Circuit first confronted the issue of the enforceability of government secrecy agreements. Given impetus from the planned disclosure of *classified* materials by former CIA agent Victor Marchetti and according controlling significance to an asserted governmental "Right to Secrecy" concerning such classified matters, 466 F.2d at 1315, Chief Judge Haynsworth there upheld an unprecedented lifelong injunction restraining Marchetti from publishing—uncensored—his written views concerning the CIA.

Thereafter, when the CIA's attempt to excise more than 300 assertedly classified items from Marchetti's book was challenged by Marchetti and his publisher, the Fourth Circuit expanded the reach of its judgment, holding that the court could not review *de novo* the propriety of the classification decisions that assertedly underlay the CIA's censorship demands. *Alfred A. Knopf, Inc.* v. *Colby, supra.*

The novel and overbroad prior restraint power won by the government in *Marchetti* and *Knopf*—cases involving publication of classified information by a former government employee—has in this case been expanded still further to apply to the publication, again by a former em-

ployee, of materials involving *no* disclosures of classified information. The Fourth Circuit has now ruled that the terms of the CIA's secrecy agreements may be enforced so as to require that *all* materials sought to be published, whether containing classified information or not, whether relating to national security interests or not, must be submitted for prior review. And, to assure petitioner's future submission to this censorship process, as well as to punish the petitioner and to serve a warning to others, the court both imposed a lifelong injunction upon the petitioner and authorized the imposition of confiscatory civil penalties, in the form of compensatory and punitive damages and, possibly, constructive trust recovery, arising out of the "breach" of petitioner's submission obligation.

Amici submit that the Fourth Circuit's ruling cannot be harmonized with the requirements of the First Amendment. In its apparent effort to defer to the interests which may properly be served by limited, internal administrative controls over the release of classified information, the Fourth Circuit has sanctioned a pervasive structure of government censorship and punishment reaching far beyond any which the government legitimately might require to achieve its ends and which, instead, impinges upon the constitutional freedoms of uncounted former government employees, the press and the public at large.

For these reasons and those reviewed below, it is vitally important for this Court to grant the petition for certiorari and overturn the decision of the Fourth Circuit.

Reasons for Granting the Writ

I.

The decision below conflicts with firmly-established First Amendment precedent.

The Fourth Circuit has evidenced little awareness of, or sensitivity to, lines of fundamental First Amendment precedent, the consideration of which is unavoidable in a case such as this. Relying solely upon the assessment of First Amendment concerns undertaken in the *Marchetti* and *Knopf* cases—opinions themselves notably devoid of clearly articulated First Amendment analysis[5]—the court below

5. In *Marchetti*, the Fourth Circuit acknowledged that "the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship." 466 F.2d at 1313. Beyond this fundamental recognition, however, the court failed to analyze the controlling constitutional precedents—adverted to herein—which should have guided the court's ultimate determination as to the enforceability of the secrecy agreements there (and here) involved. Indeed, in its *Knopf* ruling, the Fourth Circuit demonstrated the flawed nature of its constitutional analysis when, despite its earlier pronouncement, the court summarily concluded that the petitioner had "effectively relinquished his First Amendment rights" by entering into the secrecy agreements. 509 F.2d at 1370.

Numerous commentaries have criticized the manner in which the *Marchetti* and *Knopf* decisions resolved the required balancing of the competing First Amendment and governmental interests here at stake. And the decision below greatly increases the constitutionally-suspect impact of these earlier rulings. *See, e.g.*, Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 1078-79 (1973); Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1294-95 (1976); Ryan, *United States* v. *Marchetti and Alfred A. Knopf, Inc.* v. *Colby: Secrecy 2; First Amendment 0*, 3 Hastings Const. L. Q. 1073 (1976); Note, *Constitutional Law—Prior Restraint Enforced Against Publication of Classified Material by CIA Employee*, 51 N. C. L. Rev. 865 (1973); *cf.* F.O. Wilcox and R.A. Frank, eds., *The Constitution and the Conduct of Foreign Policy: An Inquiry by a Panel of the American Society of International Law* 9-10 (1976).

concluded, without apparent difficulty, that "the secrecy agreements that bound [petitioner] did not violate his First Amendment rights." 595 F.2d at 932. Indeed, Judge Hoffman, concurring on the constitutional issue, went so far as to state that, "in light of the two *Marchetti* cases, the First Amendment claim is *patently frivolous.*" *Id.* at 942 (emphasis added).

The Fourth Circuit's failure adequately to consider controlling First Amendment precedent established by this Court in resolving the competing demands of the First Amendment and a system of government censorship has here resulted in undue deference to the government's claims at the expense of First Amendment expression. This failure to address the necessary constitutional considerations pertaining to issues of such importance and potential impact requires that the writ be granted.

A. The Presumption Against Prior Restraints

Without satisfactory analysis, the Fourth Circuit has approved the imposition of a far-ranging system of prior restraints. Petitioner, now a private citizen, has been subjected to a lifelong injunction requiring him to submit writings prior to publication for review and possible censorship by the CIA. This judicially-enforced submission obligation represents a classical prior restraint. *Near* v. *Minnesota*, 283 U.S. 697 (1931). Additionally, the enforcement of this submission obligation through contract, constructive trust and punitive damage remedies of the type made available to the government by the Fourth Circuit also amounts to nothing less than a prior restraint of expression. *Smith* v. *Daily Mail Publishing Co.*, —— U.S. ——, 47 U.S.L.W. 4824 (June 26, 1979).

Yet, despite the "heavy presumption against [the] constitutional validity" of such prior restraints, *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963), the "heavy burden" upon the government to justify their imposition, *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971), and the notable historical inability of the government even in far more compelling circumstances to meet its constitutional burden, *New York Times Co.* v. *United States,* 403 U.S. 713 (1971),[6] the court below approved the system of prior restraint outlined above without as much as a passing reference to the "prior restraint" line of cases.

B. The First Amendment Rights of Government Employees

The Fourth Circuit's implicit theory of "waiver" of First Amendment rights by virtue of government service resulted in the court's failure to consider the additional line of precedent which makes clear, to the contrary, that one's status as a government employee does not thereby result in the waiver of one's constitutional rights. *See, e.g., Elrod* v. *Burns,* 427 U.S. 347 (1976); *Cole* v. *Richardson,* 405 U.S. 676 (1972). Indeed, these cases note that, in the public employment context, as in any other, "a significant impairment of First Amendment rights must survive exacting scrutiny," and must be pursued by "means closely drawn to avoid unnecessary abridgement." *Elrod* v.

6. Neither did the lower court give adequate consideration, in this connection, to whether the system of prior restraints imposed on petitioner by the CIA was one explicitly authorized by statute, as the cases decided by this Court have suggested is a significant factor in any effort at prior government censorship. *See New York Times Co.* v. *United States,* 403 U.S. 713, 731 (1971) (White, J., concurring); *Greene* v. *McElroy,* 360 U.S. 474 (1959).

Burns, supra, 427 U.S. at 362-363; *Abood* v. *Detroit Board of Ed.,* 431 U.S. 209, 259-60, *rehearing denied,* 433 U.S. 915 (1977).

It is readily apparent that the requirement to submit *all* information with *any* relation to the CIA (even information in the public domain) for pre-publication review, applied against current *and former* employees, upon penalty of contempt of court and severe and punitive damage penalties for failure to comply, was not the result of "exacting" judicial "scrutiny," nor of any effort by the Fourth Circuit to confine the system of censorship to "means closely drawn to avoid unnecessary abridgement."

II.

The decision below has broad implications for speech and press freedoms.

The failure of the court below to have considered controlling First Amendment case law has resulted not only in the disregard of petitioner's constitutional rights, but also in the disregard of the broader First Amendment interests here at stake. These far-reaching implications of the Fourth Circuit's decision alone require that the writ be granted.

A. Impact Upon Expression at the "Heart" of the First Amendment

As recently as last term, this Court reiterated that "a major purpose of [the First] Amendment was to protect the free discussion of government affairs." *First Na-*

tional Bank of Boston v. *Bellotti,* 435 U.S. 765, 776-777 (1978), *citing Mills* v. *Alabama,* 384 U.S. 214, 218 (1966). For, as this Court has noted, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* at 777 n.12, *citing Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964). Those who would seek to limit discussion at the very "heart" of the First Amendment's guarantees and purposes have been required, in recognition of these principles, to make a compelling showing in favor of secrecy, lest "those in power" succeed in suppressing "competing views on public issues 'from diverse and antagonistic sources.'" *First National Bank of Boston* v. *Bellotti, supra,* 435 U.S. at 777 n.12, *citing Associated Press* v. *United States,* 326 U.S. 1, 20 (1945). In sanctioning and rigorously enforcing the CIA's all-encompassing administrative system of prior review and censorship, the Fourth Circuit quite clearly displayed little sensitivity to the high value this Court has attached to such expression.

B. Impact Upon Other Government Employees

Petitioner is but one of many thousands of government employees potentially subject, as a result of the Fourth Circuit's ruling, to a lifelong prior restraint on expression relating to any information obtained while in government employ. Many federal agencies already require employees to sign "secrecy" agreements of one kind or another.[7]

7. Thus, agreements requiring pre-publication review similar to the ones signed by Frank Snepp at the CIA are required by the FBI, the Defense Intelligence Agency and possibly the National Security Agency/Central Security Service (NSA's agreements are themselves classified and not generally accessible). Many other agencies

(footnote continued on next page)

Still other governmental agencies enjoy the authority to classify documents, but have not yet utilized secrecy agreements.[8]

Given the additional fact that classification judgments have historically been notoriously overbroad, affecting millions of documents not significantly related to national security interests, the Fourth Circuit's ruling that such agreements, oaths, etc., carry with them express or implied lifelong obligations of silence and/or pre-screening by the government has laid the foundation—and provided the incentive—for an all-encompassing network of enforceable prior restraints covering a multitude of documents and thousands or even millions of government employees.

C. Impact Upon Third Parties, Including the Press

Another of the significant burdens on free expression implicit in the Fourth Circuit's decision is its potential impact on the rights of independent third parties, including publishers, authors, journalists or broadcasters.

require secrecy agreements with regard to classified information that expressly carry over into the post-employment period. These include the Department of State, AID, the International Communications Agency (formerly the USIA), the Bureau of Intelligence and Research, the Department of Treasury, the Department of Energy and various branches or components of the Department of Defense. Still other agencies utilize varying types of "Security Acknowledgements," "Security Agreements," "Security Briefing Statements," "Security Termination Statements," "Nondisclosure Agreements" or similar forms of oaths, affirmations or agreements acknowledging obligations of secrecy or confidentiality with regard to classified information. Some of these include the Nuclear Regulatory Commission, the Department of Justice, Energy Research and Development Administration, and the Defense Intelligence Service.

8. Under present Executive regulations, over 28 different agencies and governmental officials have the authority to classify documents originally. (Exec. Order No. 12065, 43 Fed. Reg. 28949 (1978), *reprinted in* 50 U.S.C.A. § 401 (West Supp. 1978)).

These are not merely theoretical concerns. For example, one of the *amici,* Random House, Inc., as of this very date, is a party to a contract to publish two books by petitioner, one a fictional account of the experiences of a CIA agent and the other concerning this litigation. The outstanding injunction against petitioner is so overbroad that were Random House to publish one or more of these works prior to their review by the CIA, it is arguable that not only the petitioner, but Random House as well, would be subject to legal penalties under the reasoning of the Fourth Circuit—for having done no more than publish information fully protected by the First Amendment.[9] Indeed, under the present injunction, Random House is not even permitted to receive any such material written by Snepp. The mere potential for such results bespeaks the "chilling" impact on speech and press freedoms brought about by the ruling below.[10]

---

9. The consequences of third party non-compliance with the prescreening and censorship apparatus sanctioned by the Fourth Circuit arguably include criminal contempt of court for knowing violation when a judicial injunction is in effect (with no opportunity to challenge the validity of the underlying order), or a civil action on a theory of inducing, or aiding and abetting, the alleged "breach of contract" or knowing complicity in a "breach of trust."

10. Other examples might equally be cited, such as the fictional article of the petitioner sought to be published by *amicus* Atlantic Monthly. That article, along with another, was determined by the District Court to be subject to submission to the CIA for pre-publication review under the terms of the permanent injunction in this case—thus posing the same legal uncertainties upon Atlantic Monthly as have been presented to Random House. *See also* cases cited *infra* at 17 n.12, including complaint instituted by *amicus* New Oregon Publishers, Inc. d/b/a Oregon Magazine.

D. Impact Upon the Public's Right to Receive Information

Finally ignored by the Fourth Circuit was the significant right of the public to receive information and ideas of the type sought freely to be communicated by petitioner. As this Court has consistently recognized, the protection the First Amendment affords "is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 756 (1976). *See also Procunier* v. *Martinez,* 416 U.S. 396 (1974); *First National Bank of Boston* v. *Bellotti, supra,* 435 U.S. at 783. The public's right to know can only be fully effectuated if willing speakers—such as petitioner—are not unduly encumbered by overreaching government censorship and if the press is able to perform its assigned function of securing and then publishing or broadcasting uncensored information from such willing sources about the operations of government, a process placed in doubt by the decision below.[11]

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11. It should be borne in mind that this is not a case of stolen government documents or confidential information prepared by the government for other purposes and somehow "misappropriated" for personal financial gain or other improper motives. On the contrary, this case involves the creative endeavors of a former employee—a personal account incorporating reflections, opinions and criticism based upon personal experience and recollection. The government does not "own" these manuscripts or the ideas expressed in them although it has now obtained the right to control and censor them. For similar reasons, this case should not be viewed as one depending upon an asserted First Amendment right of "access" to information that is controlled by the government. *Cf. Gannett Co., Inc.* v. *DePasquale,* —— U.S. ——, 47 U.S.L.W. 4902 (July 2, 1979).

III.

The subsequent remedies sanctioned by the decision below impermissibly chill First Amendment expression.

"[E]ven when a state attempts to punish publication after the event it must nevertheless demonstrate that its punitive action was necessary to further the state interests asserted." *Smith* v. *Daily Mail, supra,* 47 U.S.L.W. at 4825. Here, the Fourth Circuit has crafted—over and above the injunction imposed and without serious consideration of the requisite demonstration of necessity—a unique and unprecedented set of "subsequent" punitive remedies. Indeed, these remedies were made available specifically to "deter" and "punish" petitioner's exercise of First Amendment rights, albeit in alleged violation of the secrecy agreements. 595 F.2d at 937.

Thus, the Fourth Circuit held that the government can recover a compensatory award for "breach" of the secrecy agreements to the extent that it was able to prove "quantifiable" damages. *Id.* at 936. If the government could not quantify its damages, it nonetheless would be entitled to "nominal damages." *Id.* In addition, and despite the general rule in contract cases, the Fourth Circuit held that the government could recover punitive damages in amounts unrelated to the actual damage, if any, sustained by the government. *Id.* at 937. Finally, although it reversed the "constructive trust" ordered by the District Court in this case, the court held that a constructive trust over all revenues from publication could be imposed were

it shown that "classified" information had been revealed. *Id.* at 936.

The same infirmities which characterize the Fourth Circuit's approach to injunctive relief—in terms of the weighing of First Amendment interests—are reflected in the court's sanctioning of this range of onerous subsequent penalties. This compounding of the constitutional error committed by the court below also requires that the writ be granted.

A. The Availability of Punitive Damages

This Court has made clear on a number of occasions that punitive damage awards are subject to similar constitutional scrutiny as are prior restraints, since such punishment offers the potential to "inhibit the vigorous exercise of First Amendment freedoms," and to "punish expressions of unpopular views." *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 349, 350 (1974). *See also IBEW* v. *Foust,* —— U.S. ——, 47 U.S.L.W. 4600, 4601-02 (May 29, 1979); *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 83, 84 (1971) (Marshall, J., dissenting) (unbridled discretion to award damages in a First Amendment case allows the trier of fact "to penalize heavily the unorthodox and the unpopular" and "presents obvious and basic threats to society's interest in freedom of the press"). The court below failed to require the government to make a compelling showing of the propriety of punitive damages in the face of these First Amendment considerations. *Cf. Smith* v. *Daily Mail, supra.*

B. The Availability of a Constructive Trust

The Fourth Circuit's "constructive trust" ruling also has substantial "chilling" implications for the exercise of First Amendment rights, including those of non-contracting third parties. The court ruled that the constructive trust remedy would be available with regard to any future disclosure of classified material—a disclosure which, in its view, would amount to the breach of a "fiduciary duty." *Id.* at 936. However, the Fourth Circuit failed to consider the far-reaching implications of such a remedy as applied to non-contracting third parties, such as publishers exercising their First Amendment right to publish truthful information. Thus, under the general law of constructive trusts, not only the contracting employee, but also any third party publisher or other person who knowingly publishes information obtained by a government employee could arguably be compelled to hold *all* revenues acquired—including those of the publisher—for the benefit of the government, despite the fact that the publisher was not a party to any secrecy agreement and the publisher's activities were fully protected by the First Amendment. *See* Restatement (Second) on Trusts §§ 288, 291 (1959).

IV.

A conflict among the Circuits on these vitally important issues may never be presented.

For almost seven years the Fourth Circuit has, in this case and in the earlier *Marchetti* and *Knopf* cases, constructed and then expanded upon the unprecedented system of government censorship outlined above. In crafting

this unique law of government secrecy agreements, the Fourth Circuit has stood alone among the Circuit Courts of Appeals. No other court has spoken, and it is possible that no other court will soon speak, on these important issues.

Thus, the government has chosen to commence all enforcement proceedings concerning secrecy agreements of the type at issue here in the Fourth Circuit. While several private lawsuits have been instituted elsewhere, one was transferred to the Fourth Circuit on the government's motion and two others have been defended by the government in such a manner as to make unlikely an authoritative decision on the merits not controlled by Fourth Circuit precedent.[12]

Accordingly, the questionable body of law developed by the Fourth Circuit on these important issues effectively stands as the law of the land, with its attendant nationwide impact on the exercise of First Amendment rights. That impact will remain, and grow, absent this Court's review of this case.

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12. *See New Oregon Publishers, Inc. d/b/a Oregon Magazine* v. *United States,* Civ. No. 79-363 (D. Ore. 1979) (complaint instituted by *amicus* New Oregon Publishers, Inc. to overturn CIA magazine censorship dismissed as moot based in part on the government's decision not to seek judicial enforcement of the secrecy agreement); *Alfred A. Knopf, Inc.* v. *Colby,* 509 F.2d 1362 (4th Cir.), *cert. denied,* 421 U.S. 992 (1975) (affirmative action to challenge CIA book censorship, commenced in the Southern District of New York, transferred to the Eastern District of Virginia on the government's motion); *cf. McGehee* v. *Turner,* 78 Civ. 2407 (D.D.C.) (complaint filed for declaratory relief by ex-CIA agent).

Conclusion

For the foregoing reasons, the Court should grant the writ of certiorari and, upon that grant, reverse the judgment of the Court of Appeals.

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